Docket for 06-730

No. 06-730
Vide 06-713
Title: Washington, et al., Petitioners
v.
Washington State Republican Party, et al.
Docketed: November 27, 2006
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (05-35774, 05-35780)
Decision Date: August 22, 2006
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 20 2006	Petition for a writ of certiorari filed. (Response due December 27, 2006)
Nov 20 2006	Appendix of Washington, et al. filed.
Dec 18 2006	Brief of respondent Washington State Grange in support filed.
Dec 20 2006	Order extending time to file response to petition to and including January 22, 2007.
Dec 22 2006	Brief of respondent Washington State Democratic Central Committee in opposition filed.
Dec 26 2006	Brief of respondents Washington State Republican Party, et al. in opposition filed.
Jan 22 2007	Brief of respondent Libertarian Party of Washington in opposition filed. VIDED.
Feb 6 2007	Reply of petitioners Washington, et al. filed. (Distributed)
Feb 7 2007	DISTRIBUTED for Conference of February 23, 2007.
Feb 26 2007	Petition GRANTED The case is consolidated with No. 06-713 and a total of one hour is allotted for oral argument.
Mar 22 2007	The time for filing petitioners' briefs on the merits and the joint appendix is extended to and including May 14, 2007. VIDED.
Apr 5 2007	The time for filing the respondents' briefs on the merits is extended to and including August 6, 2007. VIDED.
May 3 2007	The time for filing the joint appendix and petitioners' briefs on the merits is further extended to and including May 21, 2007. VIDED
May 14 2007	Brief amicus curiae of Louisiana filed. VIDED.
May 21 2007	Joint appendix filed. (Jt.appendix in 3 volumes) VIDED. Statement of costs filed
May 21 2007	Brief of petitioners Washington, et al. filed.
Aug 2 2007	Record received from U.S.C.A. for 9th Cricuit. (1 envelope) U.S.D.C. for the Western District of Washington record is electronically filed.
Aug 3 2007	Brief of respondents Washington State Democratic Central Committee filed. VIDED.
Aug 6 2007	Brief of respondents Washington State Republican Party, et al. filed. VIDED. (Distributed)
Aug 6 2007	Brief amicus curiae of Democratic National Committee filed. VIDED.
Aug 6 2007	Brief amicus curiae of California Democratic Party filed. VIDED. (Distributed)
Aug 6 2007	Brief of respondent Libertarian Party of Washington filed. VIDED. (Distributed)
Aug 8 2007	CIRCULATED.
Aug 14 2007	SET FOR ARGUMENT Monday, October 1, 2007.
Aug 17 2007	Motion for divided argument filed by petitioner Washington State Grange. VIDED.
Sep 7 2007	Reply of petitioners Washington, et al. filed. (Distributed)

NO. ____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON; ROB MCKENNA, ATTORNEY GENERAL; SAM REED, SECRETARY OF STATE,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; MICHAEL YOUNG; DIANE TEBELIUS; MIKE GASTON; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; J.S. MILLS; WASHINGTON STATE GRANGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *California Democratic Party v. Jones*, this Court recognized that, consistent with the First Amendment rights of political parties, a state may adopt a primary election system in which all voters may participate and the top vote recipients advance to the general election, so long as "primary voters are not choosing a party's nominee." *California Democratic Party v. Jones*, 530 U.S. 567, 585-86 (2000). Washington voters adopted a primary election system in which all qualified voters are allowed to vote for any candidate, and the two candidates receiving the most votes for a given office qualify for the general election ballot, without regard to party affiliation.

Does Washington's primary election system in which all voters are allowed to vote for any candidate, and in which the top two candidates advance to the general election regardless of party affiliation, violate the associational rights of political parties because candidates are permitted to identify their political party preference on the ballot?

PARTIES

Petitioners: The State of Washington; Sam Reed, the Washington State Secretary of State; and Rob McKenna, the Washington State Attorney General. These parties were Intervenor Defendants in the district court and Appellants in the Court of Appeals.[1]

Respondents: (1) The Washington State Republican Party and the following individuals who were or are officers and adherents of that Party: Christopher Vance, Bertabelle Hubka, Steve Neighbors, Brent Boger, Marcy Collins, and Michael Young. These parties were Plaintiffs-Appellees below.

(2) The Libertarian Party of Washington State and the following individuals who were or are officers and adherents of that Party: Ruth Bennett and J.S. Mills. The parties were Intervenor Plaintiffs-Appellees below.

(3) The Washington State Democratic Central Committee and Paul Berendt (its Chair when the litigation was commenced). These parties were Intervenor Plaintiffs-Appellees below.

(4) The Washington State Grange. This party was an Intervenor Defendant-Appellant below.

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[1] The original named Defendants in the district court were nine county election officers. By order of the district court, these parties were dismissed and the Petitioners identified above were substituted as Defendants.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of the State of Washington and its Secretary of State Sam Reed, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 460 F.3d 1108 (9th Cir. 2006). App. 1a. The opinion of the United States District Court for the Western District of Washington is reported at 377 F. Supp. 2d 907 (W.D. Wash. 2005). App. 35a.

JURISDICTION

The judgment of the Ninth Circuit was entered August 22, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.

Wash. Rev. Code § 29A.04.127[2] provides:

> "'Primary' or 'primary election' means a procedure for winnowing candidates for public office to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate."

Wash. Rev. Code § 29A.04.206 provides:

> "The rights of Washington voters are protected by its constitution and laws and include the following fundamental rights:
>
> "(1) The right of qualified voters to vote at all elections;
>
> "(2) The right of absolute secrecy of the vote. No voter may be required to disclose political faith or adherence in order to vote;
>
> "(3) The right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate."

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[2] The lower courts declared unconstitutional all of the contents of Initiative Measure 872 (2005 Wash. Sess. Laws page nos. 9-14). The portions of the Measure which were the primary basis for challenge in this litigation are reproduced here. The entire contents of the Measure may be found in the Appendix at pages 114a through 124a.

Wash. Rev. Code § 29A.24.030 provides, in part:

> "A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:
>
> ". . . .
>
> "(3) For partisan offices only, a place for the candidate to indicate his or her major or minor party preference, or independent status[.]"

Wash. Rev. Code § 29A.04.110 provides:

> "'Partisan office' means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name. The following are partisan offices:
>
> "(1) United States senator and United States representative;

> "(2) All state offices, including legislative, except (a) judicial offices and (b) the office of superintendent of public instruction;
>
> "(3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise."

Wash. Rev. Code § 29A.36.010 provides:

> "On or before the day following the last day allowed for candidates to withdraw under [Wash. Rev. Code §] 29A.24.130, the secretary of state shall certify to each county auditor a list of the candidates who have filed declarations of candidacy in his or her office for the primary. For each office, the certificate shall include the name of each candidate, his or her address, and his or her party preference or independent designation as shown on filed declarations."

Wash. Rev. Code § 29A.36.170 provides, in part:

> "(1) For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes will appear first and the candidate who received the next greatest number of votes will appear second. No candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding

primary, if a primary was conducted. On the ballot at the general election for an office for which no primary was held, the names of the candidates shall be listed in the order determined under [Wash. Rev. Code §] 29A.36.130."

STATEMENT

For almost seventy years, from 1935 to 2003, Washington used a "blanket primary" system to nominate candidates for partisan political office. When California adopted a similar system, the political parties challenged its constitutionality, and this Court eventually ruled that the California primary unconstitutionally abridged the constitutional rights of the political parties. *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (*Cal. Dem. Party*). Washington's major political parties then challenged the Washington primary system. The Ninth Circuit ruled that Washington's system was not distinguishable from California's and declared it invalid in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. denied sub nom. Reed v. Democratic Party of Washington*, 540 U.S. 1213 (2004), *and cert. denied by Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957 (2004).

In response to these cases, the Washington State Grange (which had proposed the original blanket primary in 1935) sponsored an initiative measure in 2004 to establish an election system designed to eliminate the features this Court found unconstitutional in *Cal. Dem. Party* while retaining the most popular aspect of the blanket primary: the

freedom of each voter to vote for any candidate for any office on the primary ballot, without regard to the party affiliation of the candidate or the voter. Initiative Measure 872 (I-872), incorporating this effort, was approved by the voters in November 2004 and took effect in December 2004. In May 2005, the Republican Party initiated the present litigation in the District Court for the Western District of Washington, asserting that I-872 had the same constitutional infirmities as Washington's former blanket primary. The Libertarian and Democratic parties intervened as additional plaintiffs. Both the State of Washington and the Grange intervened as defendants and took the position that I-872 is constitutionally sound.

1. Proceedings In The District Court

This action was filed in May 2005, approximately five months after I-872 had gone into effect and before any election had been conducted under the new measure. At the time the case was filed, the Republican Party moved for a preliminary injunction to prevent the state from implementing I-872. After conferring with the parties, the district court adopted an expedited briefing schedule and a hearing date, treating the motions as if they were for permanent injunctive relief. The district court (Judge Thomas Zilly) conducted a hearing on July 13, 2005, and issued an order on July 15, 2005, granting the plaintiffs declaratory and injunctive relief and finding that the implementation of I-872 would unconstitutionally impair the freedom of speech and associational rights of the plaintiff political parties. App. 35a.

The district court decided that nominating candidates for office is such a central function of a political party that even allowing a candidate to publicly state a party preference creates a constitutionally significant "association" between the candidate and the party, an "association" which states may not foster without political party consent. App. 67a-70a. The Court also found that I-872 would result in the selection of party "nominees" because a candidate stating a party preference would somehow automatically be seeking that party's "nomination" for office. App. 70a-72a.

A permanent injunction was entered on July 29, 2005, restraining Washington from implementing I-872 or from conducting any elections under the Measure.[3] App. 93a.

2. Proceedings In The Ninth Circuit Court Of Appeals

Both the State and the Grange appealed the district court's ruling to the United States Court of Appeals for the Ninth Circuit. The case was argued and submitted to a three-judge panel on February 6,

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[3] The political parties had also asserted the unconstitutionality of certain aspects of the open primary system enacted by the Washington Legislature in 2004 to replace the blanket primary. The district court reserved ruling on those issues and allowed the continued use of the open primary, pending further proceedings. Under Washington's open primary (similar to those used by about half the states), a voter in the primary selects the ballot of one major political party and is confined to voting for candidates seeking that party's nomination for the offices listed on the ballot. Voters are not required to register by party or publicly declare an affiliation with a party.

2006. On August 22, 2006, the panel issued an opinion affirming the district court and finding I-872 unconstitutional in its entirety on the theory that the election system established in I-872 severely burdened the constitutional rights of the political parties and was not narrowly tailored to meet a compelling state interest. App. 1a.

The Ninth Circuit's rationale was that I-872, by permitting candidates to identify their political party preferences, creates an "overtly partisan" primary, even though party preference plays no part in determining which candidates qualify for the general election. App. 19a. Like the district court, the Ninth Circuit decided that this was sufficient to "severely burden" the rights of the political parties, and found that Washington had no "compelling state interest" in imposing such a "burden." App. 30a. The district court's permanent injunction was affirmed. App. 34a.

REASONS FOR GRANTING THE PETITION

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). In Initiative 872, the voters of Washington have enacted a system designed to preserve the rights of citizens to vote freely for the candidates of their choice and to extend these rights to the primary, as well as the general election. In opposing this effort, the political parties, and not the State, seek to restrict both the rights of voters to freely participate in the selection of candidates for public office and the rights of

candidates to freely express their points of view. Unfortunately, the Court of Appeals lost sight of the need to balance the interests of political parties against the prerogatives of the State and the rights of its voters.

In *Cal. Dem. Party*, this Court carefully balanced the constitutional prerogative of each state to establish its own preferred election system with the speech and associational rights of the political parties. This Court found that California had established a system in which (1) the primary was a process which nominated political party candidates for each partisan elective office, but (2) non-members (independent voters and adherents of rival parties) were free to participate in the nomination process. This opened at least the possibility that the "nominee" of a party would not be the person who would have been selected by the membership of the party. This combination of features, this Court found, impaired the constitutional rights of the political parties.

In response to *Cal. Dem. Party* and to the case invalidating Washington's own blanket primary, the people of Washington crafted an election system correcting the constitutional infirmities of the blanket primary while preserving, to the maximum extent possible, the right of all voters to participate in the nomination process for each office. Initiative 872 eliminates the use of the primary to nominate political party candidates for office. Party affiliation would no longer play any role in qualifying candidates for the general election ballot, and party "nomination" or endorsement would be an entirely private process. To provide information that may be

important to voters, I-872 allows candidates to state their party preference on the ballot.

Nonetheless, the Ninth Circuit concluded that this primary election system unconstitutionally burdened the associational rights of the political parties. This Court should dispel the notion embraced by the Ninth Circuit that *Cal. Dem. Party* leaves so little room to the states to advance their important interests in maximizing the informed participation of their citizens in the process of choosing the officials who will govern them.

A. Initiative 872 Establishes An Election System Designed In Specific Response To This Court's Decision In *Cal. Dem. Party*

Near the end of the majority opinion in *Cal. Dem. Party*, this Court described a "nonpartisan primary" which, the Court observed, would serve many of the interests asserted by California without burdening political party rights. In the system described, after qualified candidates competed in the primary, the top two vote getters (or however many the state might prescribe) would move on to the general election. As the Court observed: "This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee." *Cal. Dem. Party*, 530 U.S. at 585-86.

The Ninth Circuit concluded that this language forecloses a nonpartisan primary in which candidates are allowed to include their party preference on the ballot. App. 17a-18a. The lower court apparently concluded that the quoted language referred only to nonpartisan elections in which a

candidate's political party preference does not appear on the ballot. Justice Stevens, in his dissent, understood the majority opinion to be speaking of a primary such as that conducted in Louisiana. *Cal. Dem. Party*, 530 U.S. at 598 n.8 (Stevens, J. dissenting). In the Louisiana primary, broadly similar to the one established for Washington in I-872, the party affiliations of the candidates appear on the primary and general election ballots. *See Foster v. Love*, 522 U.S. 67 (1997); *see also Dart v. Brown*, 717 F.2d 1491 (5th Cir. 1983).

Initiative 872 establishes a "nonpartisan primary" exactly meeting the Court's description. Under I-872, the process for winnowing candidates is exactly the same for nonpartisan and for partisan offices: for each office, the top two vote getters qualify for the general election, which is in effect a runoff election. In the primary, all candidates compete for the votes of all of the voters, and party affiliation does not determine who qualifies for the general election ballot.[4] The only distinction remaining between "partisan" and "nonpartisan" offices is that, for those offices defined by state law as "partisan," candidates have the option of listing their party preference on the filing papers (or declaring themselves independents), and that party preference (if any) will appear on the primary and

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[4] This system is in sharp contrast to the blanket primaries formerly conducted by Washington, California, and Alaska. In those systems, the top vote getter under each party designation qualified for the general election. The blanket primary exhibited the feature this Court found "constitutionally crucial": primary voters chose party nominees. Initiative 872 eliminates this "crucial" feature.

general election ballots.[5] Party preference plays no role in determining the winners in the primary, but is some information about the candidate that voters may find useful and, for this reason, it is provided to them.

Yet the political parties argue, and the lower court concluded, that merely allowing self-designated party preferences on the ballot unconstitutionally interferes with the political parties' rights of free speech and association. While this Court found the "constitutionally crucial" feature of the blanket primary was that political party nominees for public office were selected by non-members, the Ninth Circuit reads *Cal. Dem. Party* as establishing a much broader "right of association", such that even permitting a candidate to state a personal preference for a party constitutes a "forced association" between the candidate and the party in question. App. 22a-25a. The Ninth Circuit found this "right of association" primarily in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). Yet the lower court failed to account for the crucial distinction between the Connecticut system at issue in *Tashjian* (a traditional "closed" primary clearly

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[5] The only distinction under Washington's law between partisan offices and nonpartisan offices is that for "partisan" offices, candidates have the option of showing their party preferences on the ballot. Wash. Rev. Code § 29A.24.030. App. 105a. The Washington statute under challenge does not require any candidate to express a party preference. *Id.* It is possible that, for some offices, every candidate filing would decline to declare a party preference, in which case the primary conducted for that office would be indistinguishable from a "traditional" nonpartisan primary.

conducted for the purpose of selecting party nominees for each office), and the system established in I-872 (primary not conducted to select party nominees but merely to winnow the "top two" vote getters).

The Ninth Circuit concluded that, under *Cal. Dem. Party*, the mere appearance of a self-designated party preference on the ballot results in selection of individuals "who may effectively become the parties' standard bearers in the general election." App. 19a. The lower court does not explain how a candidate who states the candidate's preference as "Republican" becomes the standard bearer for the Republican Party upon qualifying for the general election under I-872, or who is the Republican "standard bearer" if *both* of the top two vote getters identify "Republican" as their preferred political party. App. 19a-22a. It is sufficient for the Ninth Circuit that the party preference of a candidate "creates the impression of associational ties" between candidate and party. App. 22a.[6]

In effect, the Ninth Circuit evaluated I-872's "top two" primary through the prism of "party nomination" primaries commonly used in other states. The court assumed that voters would

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[6] Candidates for office have a constitutional right to express their views on the public issues relating to their candidacy, and this certainly includes the right to publicly identify with a political party (or decline to do so). *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Yet, the lower courts concluded that allowing an expression of party preference to appear on the ballot would somehow constitute a "forced association" between the candidate and the party for which the candidate expresses a preference.

perceive a candidate as the "Republican" candidate for an office, based on voters' experience in other times and places, and that this perception was sufficient to invalidate Washington's attempt to create a new system for winnowing candidates for public office.

It certainly is true that states may adopt primary election systems that function as taxpayer-funded party nominating primaries. But states need not do so, and Washington has not. The lower courts failed to recognize that this Court has never found that political parties are constitutionally entitled to taxpayer-funded nominating primaries tailored to satisfy each party's preference as to how to select its standard bearers for public office. States are entitled to leave this process to the political parties and to devise a nomination process that emphasizes the full participation of all voters (regardless of party affiliation). The question here is whether I-872, by accommodating the legitimate interest of the voters in having relevant information about candidates, somehow transforms its primary election system that winnows candidates for the general election without regard to party affiliation, into a party nominating process.

In *Cal. Dem. Party*, this Court left the door open for states to seek election systems that reflect the popular will while respecting the rights of political parties as private organizations. In this case, the Ninth Circuit has effectively closed that door and holds that even taking notice of a candidate's political party preference transforms any primary into a party nomination process. In misconstruing this Court's language in *Cal. Dem.*

Party, the Ninth Circuit severely limits the choices states have in deciding how to structure their election systems to best serve their citizens.

B. So Long As States Respect The Constitutional Rights Of Political Parties As Private Organizations, States Have Broad Discretion In Structuring Their Election Systems

In the California case, this Court expressly recognized that states play a central role in structuring the election process. *Cal. Dem. Party*, 530 U.S. at 572; *see also* discussion *id.* at 590-91 (the same point in the dissent, which describes the power to determine how state officials are elected as a "quintessential attribute of sovereignty"). More recently, this Court upheld the policy choice of a state concerning its election system in *Clingman v. Beaver*, 544 U.S. 581 (2005). In *Clingman*, the Court upheld the choice of Oklahoma to operate a semi closed primary in which participation in a given party's nomination process was limited to (1) voters who registered as affiliated with that party and (2) independent voters. The Libertarian Party sought to permit registered affiliates of other parties (Republicans, Democrats) to vote in the Libertarian primary without changing their party affiliation. The Court found that Oklahoma had not violated the constitutional rights of the Libertarian Party or of any voters in structuring its primary. *Clingman*, 544 U.S. at 596-97.

Clingman is especially significant to this case because it establishes a "two tier" analysis in

balancing state sovereignty interests against the associational rights of the political parties. Regulations that impose "severe burdens" on associational rights must be narrowly tailored to serve a compelling state interest. *Clingman*, 544 U.S. at 586-87 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). However, when state regulations impose lesser burdens, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Clingman*, 544 U.S. at 587 (internal quotation marks omitted) (quoting *Timmons*, 520 U.S. at 358).

Although the Ninth Circuit in this case cites *Clingman* and *Timmons* and recognized the two-tiered analysis (App. 14a-15a), the circuit court decision did not explicitly analyze whether I-872 "severely burdens" the political parties. The circuit court appears to have concluded that the mere inclusion of party preference on the ballot under I-872 is sufficient to "severely burden" the political parties because of the danger that it will create "false associations" between candidates and political parties. App. 28a. In other words, the circuit court concluded that it would severely burden a political party's constitutional rights for any candidate for public office to publicly state a preference for that party, unless the party has somehow permitted this "association." This Court has never defined parties' associational interests so broadly. It would be surprising to do so, given the implications of such a principle upon (1) the free speech rights of candidates to express their views, including their opinions about political parties; (2) the rights of

voters to have access to relevant information about candidates for public office, including their political views in general and the party preference more specifically; and (3) the authority of a state to recognize and balance these interests in deciding how to structure their election systems.

As noted above, I-872 eliminates the "constitutionally crucial" defect of Washington's old blanket primary by decoupling the use of the primary from the party nomination process. Parties remain free to operate as private organizations, including the exercise of their important right to advance the cause of their favored candidates for public office, but the state election system is no longer used to select party nominees. Under I-872, one or both of the "top two" candidates advancing to the general election ballot may show a party preference, but that fact in no sense makes them the "nominees" or "standard bearers" of those parties. There is no reason to think voters would be confused on that point and no reason to build an analysis on the assumption that voters are naive or ill-informed. Parties retain the full panoply of rights to recruit, support, raise funds, and publicize their preferences. If I-872 imposes any burden on the political parties, it is relatively light and insubstantial. The Ninth Circuit erred, therefore, in concluding that I-872 is invalid because it is not "narrowly tailored" to satisfy a compelling state interest.

C. The Ninth Circuit Opinion Leaves States Uncertain As To Their Constitutional Choices In Structuring Their Election Laws

In *Cal. Dem. Party*, as in *Timmons* and *Clingman*, this Court re-emphasized the central role state policy plays in determining how elections for state and federal offices are conducted. The California decision establishes that states may not (1) require political parties to nominate their candidates for public office through a state-conducted primary, and (2) force each party to accept, without consent, the participation of non-members, including adherents of other political parties, in the nomination process. In this case, unlike the one before the Court in *Cal. Dem. Party*, the state is not requiring political parties to nominate their candidates for public office through a state-conducted primary. Rather, the state is conducting a primary to choose candidates for public office without regard to their political party affiliation. Although the political party preferences of the candidates, if any, are disclosed to the voters, they do not determine who participates in the general election. Under I-872, "party nomination" is a private process to be determined by each party.

Yet, the Ninth Circuit decision concludes that even this election system, in which the only recognition of party preference is permitting candidates' party preferences (if any) to appear on the ballot, violates the associational rights of the political parties. Under the Ninth Circuit's rationale, parties have a right not only to decide how to nominate "their" candidates for office, but also a

right to restrain a state from operating an election in which the voters are informed of the candidates' party preferences. This seriously infringes on the prerogative of the state to fashion its election system to promote full and informed participation by its citizens, and suggests far greater control by political parties over the manner in which states may conduct elections than this Court has thus far recognized. Indeed, *Cal. Dem. Party* and *Clingman* strongly suggest that states can make uniform and reasonable decisions with respect to their election systems, so long as they are not "severely" interfering with the "private" aspects of party nomination.

If the Ninth Circuit decision stands, Washington and other states will face continuing uncertainty and litigation concerning how they may organize their election systems. This area of the law implicates the core of our democratic institutions. Review by this Court is necessary to provide the modicum of clarity and balance that it warrants.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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November 20, 2006

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No. 06-730

In The
Supreme Court of the United States

STATE OF WASHINGTON; ROB MCKENNA, Attorney General; SAM REED, Secretary of State,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; MICHAEL YOUNG; DIANE TEBELIUS; MIKE GASTON; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; J.S. MILLS; WASHINGTON STATE GRANGE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RESPONSE OF WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2004, Washington State adopted a compulsory primary election system for partisan office that requires the Democratic Party to accept as Democratic candidates all registered voters who desire to have the Democratic Party's name printed after theirs on the ballot. No mechanism is provided by law nor is any party-run selection process recognized that would permit the Democratic Party to select or limit the candidates with whom it is associated on these public ballots and in publicly-financed election material. Moreover, under this system all primary voters, whether affiliated with the Democratic Party or not, select the candidates who will appear on the general election ballot with the Democratic Party's name after theirs, if any.

Should Washington's partisan primary system be subject to strict scrutiny in light of *California Democratic Party v. Jones*, 530 U.S. 567 (2000) and *Clingman v. Beaver*, 544 U.S. 581 (2005)?

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STATEMENT OF THE CASE

Since its first elections as a state in 1889, Washington has conducted partisan elections. As part of its partisan election system, candidates for partisan office have always had their party affiliation printed after their names on primary and general election ballots. Throughout Washington's history as a state, partisan political candidates have been explicitly associated with partisan political parties on election ballots.

Between 1935 and 2004, Washington State forced political parties to allow the general public to select the party's general election candidates by means of a blanket primary. In 2004, Washington's blanket primary was finally determined to be unconstitutional in light of this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). *Democratic Party of Washington State v. Reed,* 343 F.3d 1198 (9th Cir. 2003), *cert. denied,* 540 U.S. 1213 (2004), and *cert. denied,* 541 U.S. 957 (2004).

In response to the constitutional infirmities of the blanket primary, the Washington Legislature adopted an "open private choice" primary system. In this system, a voter can only vote in one party's primary in any given election. The choice of party primary in which to vote is deemed to imply an affiliation of the voter with that party, but the voter's choice of party is private.

Immediately thereafter, the Washington State Grange sponsored Initiative 872 "to protect the state's primary system" and to "preserve[] the rights that voters now enjoy under the [unconstitutional] blanket primary." Ct. App. ER 512 (internal quotation marks omitted). In a "Frequently Asked Questions" statement explaining its initiative, the Grange told voters that, if the initiative

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were passed, the primary ballot would be just like the primary ballot used in the unconstitutional blanket primary:

> At the primary, the candidates for each office will be listed under the title of that office, the party designations will appear after the candidates' names, and the voter will be able to vote for any candidate for that office (just as they now do in the blanket primary).

Ct. App. ER 22. Grange President Terry Hunt stated: "Our initiative will put a system in place which looks almost identical to the blanket primary system we've been using for nearly 70 years." Ct. App. ER 501.

Initiative 872 defined partisan office as any office for which any candidate may have his or her party preference appear on the primary and general election ballot "in conjunction with" the candidate's name. State App. 119a (I-872 § 4). Under the Initiative, at the time of filing for partisan office, any registered voter may indicate that his or her party preference is Democrat. The state will then place that party identification after the name of the candidate on primary and general election ballots and will repeat that party identification to the voting public in a government-produced voters' pamphlet. State App. 117a-118a, 120a (I-872, §§ 7-8, 11). Moreover, as with the blanket primary found unconstitutional in *Jones*, all voters are permitted to vote for any candidate for each partisan office without any limitation based on party preference or affiliation. State App. 115a (I-872 § 3). In order to appear on the general election ballot, a candidate must be one of the two candidates receiving the most primary votes. State App. 117a (I-872 § 7). The names of successful primary candidates appear on the general

election ballot "in conjunction with" the party preference each candidate indicated at filing. State App. 115a-116a (I-872, §§ 4, 6).

The Democratic Party has rules requiring that its candidates for public office be selected by Democrats, either in a public primary or a party-run caucus. However, the State of Washington refuses to recognize any process for nominating partisan candidates other than that provided by I-872. Ct. App. ER 45-53. Indeed, under Initiative 872 members of the Democratic Party are deprived of any opportunity to determine the candidates or voters with whom they will be associated in the primary and general balloting for partisan races.

I-872 was intended to affect the Democratic Party's choice of candidates and adulterate the Democratic Party's political message: "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters." Ct. App. ER 257. "[Candidates] will not be able to win the primary by appealing only to party activists." Ct. App. ER 29.

Initiative 872 was passed by the voters in November, 2004. Shortly thereafter, the Republican Party of Washington filed suit seeking an order declaring Initiative 872 unconstitutional. The Democratic Party intervened as an additional plaintiff.

1. Proceedings in the District Court.

The political parties sought summary judgment and entry of a permanent injunction against implementation of Initiative 872 on the basis that the Initiative severely burdened their First Amendment rights of association and

was not narrowly tailored to advance a compelling state interest. The United States District Court for the Western District of Washington (Zilly, J.) issued its opinion July 15, 2005. The district court noted the State's Voters' Pamphlet had summarized for voters the effect of passing the Initiative as follows:

> This measure would allow voters to select among candidates in a primary. Ballots would indicate candidates' party preference. The two candidates receiving [the] most votes advance to the general election regardless of party.

State App. 60a. The district court summarized the constitutionally relevant aspects of the primary election system created by Initiative 872:

> (1) Initiative 872 allows candidates to designate a party preference when filing for office, without participation or consent of the party; (2) requires that political party candidates be nominated in Washington's primary; (3) identifies candidates on the primary ballot with party preference; (4) allows voters to vote for any candidate for any office without regard to party preference; (5) allows the use of an open, consolidated primary ballot that is not limited by political party and allows crossover voting; and (6) advances candidates to the general election based on open, "blanket" voting.

State App. 72a (footnote omitted).

The district court found that "a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections." State App. 65a (internal citations and quotations omitted). The district court concluded that "Initiative 872 . . . impermissibly denies party adherents the opportunity to nominate

their party's candidate free of the risk of being swamped by voters whose preference is for the other party." State App. 75a (internal citation and quotations omitted). It "forces political parties to associate with – to have their nominees, and hence their positions, determined by – those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." State App. 75a. The district court concluded that Initiative 872 imposed a severe burden on First Amendment rights, that it was not narrowly tailored, and that no compelling state interest that it advanced had been articulated. Accordingly, the district court found Initiative 872 to be unconstitutional. State App. 91a.

2. United States Court of Appeals for the Ninth Circuit Proceedings.

The State and the Grange appealed the district court's decision. The Ninth Circuit found that:

> By including candidates' self-identified party preferences on the primary ballot, Washington permits all voters to select individuals who may effectively become the parties' standard bearers in the general election. . . . Whether or not the party wants to be associated with that candidate, the party designation is a powerful, partisan message that voters may rely upon in casting a vote [] in the primary and in the general election. The Initiative thus perpetuates the "constitutionally crucial" flaw *Jones* found in California's partisan [blanket] primary system.

State App. 19a-20a. In its opinion the Ninth Circuit concluded that:

> The net effect [of Initiative 872] is that parties do not choose who associates with them and runs using their name; that choice is left to the candidates and forced upon the parties by the listing of a candidate's name "in conjunction with" that of the party on the primary ballot. Such an assertion of association by the candidates against the will of the parties and their membership constitutes a severe burden on political parties' associational rights.

State App. 25a (internal citations omitted).

The Ninth Circuit found that neither the State nor its co-party the Grange had articulated any compelling state interest to justify the burden placed upon associational rights. It affirmed the district court's conclusion that Initiative 872 was unconstitutional.

REASONS FOR DENYING THE PETITION

1. The Ninth Circuit Did Not Err.

The State concedes that the Ninth Circuit recognized and applied the proper test for constitutionality of statutes that burden First Amendment rights, as mandated by this Court under *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). State Pet. at 16. As the State concedes, under that test, where a statute severely burdens associational rights it must be narrowly tailored to advance a compelling state interest before it may be held constitutional. State Pet. at 16. The State has not articulated, either in its Petition or in the proceedings below, any compelling state interest that Initiative 872 is narrowly tailored to advance. State App. 4a. Instead, the State simply disagrees with the conclusion of the Ninth

Circuit and the district court that Initiative 872 severely burdens First Amendment rights. The State is wrong.

The proponents of Initiative 872 made clear in their campaign that the purpose of the Initiative is to force political parties to recruit different candidates and articulate a different message that appeals to a "broad" group of voters, not party members. In *Jones*, this Court concluded that such an outcome, which effectively changes a political party's message, is a severe burden on First Amendment rights. Indeed, this Court noted, "We can think of no heavier burden on a political party's associational freedom." *Jones,* 530 U.S. at 582.

The State does not dispute that Initiative 872 forces political parties to be associated with self-identified candidates on public ballots. Instead, it seeks to exempt Initiative 872 from strict scrutiny by arguing that under Initiative 872, primary voters are not "nominating" candidates with whom the Democratic Party will be associated on the general election ballot, only deciding which self-designated Democrats, if any, will be permitted to advance. But this is a distinction without a difference. As with the blanket primary invalidated in *Jones*, candidates for partisan elective office are associated on primary and general election ballots with political parties that they self-select without party involvement. And all voters, regardless of party affiliation, are still determining which party-identified candidates, if any, will advance from the primary to the general election ballot.

The State's argument might be persuasive if the primary compelled by Initiative 872 were preceded by a party nomination process that allowed the party to select those candidates with whom it would be associated on the

ballot. In such circumstances, voters at large would not be selecting the party's candidates and the constitutional burden might be acceptable. *See Jones*, 530 U.S. at 585-86; *see also id.* at 598 n. 8 (Stevens, J., dissenting) (non-partisan blanket primary described by Court is a system "in which candidates previously nominated by the various political parties and independent candidates compete.").[1]

The primary created by Initiative 872, however, is not the primary contemplated in the *Jones* dicta. Party labels are used; therefore the primary is not "non-partisan." Indeed, the State concedes that party labels used on a ballot communicate information that voters may find relevant to their voting decisions. State Pet. at 11-12. As the Ninth Circuit noted, "political parties' names matter; they are shorthand identifiers that voters traditionally rely upon to signal a candidate's substantive and ideological positions." State App. 27a (citation omitted). This Court in *Clingman v. Beaver* expressed concern that "[o]pening the [Libertarian Party's] primary to all voters . . . would render the [Libertarian Party's] *imprimatur* an unreliable index of its candidate's actual philosophy." 544 U.S. 581, 595

[1] The State argues the cited section of *Jones* creates a constitutional framework in which the Democratic Party's First Amendment rights have strong protection against non-adherents selecting one candidate for the Party but virtually no protection against non-adherents selecting two candidates for the Party. The Party's right to select the individuals who will carry its message to the public is an area of special protection under the First Amendment. It is not an area in which this Court would elevate form over substance as argued by the State. "[O]ur cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'" *Jones*, 530 U.S. at 574 (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)).

(2005) (emphasis in original). Initiative 872 undermines the ability of a political party to control its message to the voters even more profoundly than did the statute addressed in *Clingman*. Under Initiative 872, State election officials do not recognize any party-based candidate selection process, do not provide any public process for Democrats to select their candidates other than the primary created by Initiative 872, and freely allow any candidate to use the Party's name on the election ballot.

The State has no right to force the Democratic Party to include anyone in its general election "parade" of messengers. This Court has long recognized that a political party has a constitutional right to nominate its standard bearers. *Timmons*, 520 U.S. at 359. The State gains no additional rights to modulate a political party's message by virtue of forcing two candidates onto the party rather than only one.

Having determined that the Initiative imposes a severe burden on the associational rights of political parties, the Ninth Circuit found that neither the State nor the Grange had articulated a compelling state interest that Initiative 872 advances. To the extent that the State and Grange sought to rely on the alleged compelling state interests articulated in support of the blanket primary and rejected in *Jones*, the Ninth Circuit determined that Initiative 872 was not narrowly tailored: the State could have advanced its interests by requiring that candidates entitled to use the Democratic Party's name on ballots be selected by the Party in advance, and requiring those not selected to run as independents.

The Ninth Circuit correctly analyzed Initiative 872 as required by this Court in *Timmons* and found it wanting. It correctly declared Initiative 872 unconstitutional.

2. Neither this Court nor the Ninth Circuit Have Left Any Uncertainty for States as to their Constitutional Choices in Structuring Election Laws.

The State asserts that the Ninth Circuit's opinion in this case – which strictly adheres to constitutional guidelines articulated by this Court over decades – "leaves states uncertain as to their constitutional choices in structuring their election laws." State Pet. at 18. On the contrary, the constitutional limit to a state's power to organize its partisan elections is crisp and clear: the state must allow each political party to select its candidates. Provided it does so, the state may provide any election system that sets reasonable, non-discriminatory qualifications – including a public voting mechanism – to determine which of those candidates appears on the general election ballot. Review by this Court of the Ninth Circuit's decision in this case is not necessary to clarify this simple, straightforward rule.

CONCLUSION

The Ninth Circuit was correct in affirming the district court's conclusion that Initiative 872 unconstitutionally invaded core First Amendment rights of association. The State of Washington's Petition for a Writ of Certiorari should be denied.

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No. 06-730

In The
Supreme Court of the United States

STATE OF WASHINGTON; ROB MCKENNA, Attorney General; SAM REED, Secretary of State,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; MICHAEL YOUNG; DIANE TEBELIUS; MIKE GASTON; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; J.S. MILLS; WASHINGTON STATE GRANGE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1, cl. 2 provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

WASH. CONST. art. II, § 15 provides, in part:

> Such vacancies as may occur in either house of the legislature or in any partisan county elective office shall be filled by appointment by the county legislative authority of the county in which the vacancy occurs: *Provided*, That the person appointed to fill the vacancy must be from the same legislative district, county, or county commissioner or council district and the same political party as the legislator or partisan county elective officer whose office has been vacated, and shall be one of three persons who shall be nominated by the county central committee of that party. . . . *Provided,* That in case of a vacancy occurring after the general election in a year that the office appears on the ballot and before the start of the next term, the term of the successor who is of the same party as the incumbent may commence once he or she has qualified and shall continue through the term for which he or she was elected. . . .

WASH. REV. CODE § 29A.04.086 provides, in part:

> "Major political party" means a political party of which at least one nominee for president, vice president, United States senator, or a statewide

> office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year. A political party qualifying as a major political party under this section retains such status until the next even-year election at which a candidate of that party does not achieve at least five percent of the vote for one of the previously specified offices. . . .

WASH. REV. CODE § 29A.52.311 provides, in part:

> Not more than ten nor less than three days before the primary the county auditor shall publish notice of such primary in one or more newspapers of general circulation within the county. The notice must contain the proper party designations, the names and addresses of all persons who have filed a declaration of candidacy to be voted upon at that primary. . . .

WASH. REV. CODE § 42.17.020(10) provides:

"'Caucus political committee" means a political committee organized and maintained by the members of a major political party in the state senate or state house of representatives."

WASH. REV. CODE § 42.17.640(2) provides, in part:

"No person, other than a bona fide political party or a caucus political committee, may make contributions to a candidate for a state legislative office or county office that in the aggregate exceed seven hundred dollars. . . ."

WASH. ADMIN. CODE § 434-215-015, prior to the July 19, 2005 injunction, provided in part:

> NEW SECTION
>
> WAC 434-215-015 Political party preference and independent status. A candidate for partisan office who files a declaration of candidacy properly must appear on the primary election ballot, regardless of the candidate's party preference or independent status. . . . [N]either endorsement by a political party nor a nominating convention are [sic] required in order to file a declaration of candidacy and appear on the primary election ballot. . . .

WASH. ADMIN. CODE § 434-230-170, prior to the July 19, 2005 injunction, provided in part:

> AMENDATORY SECTION (Amending WSR 04-15-089, filed 7/16/04, effective 8/16/04)
>
> WAC 434-230-170 ((~~Electronic voting devices~~)) Ballot form. Each office on the ballot shall be identified, along with a statement designating how many candidates are to be voted on for such office. . . . Following the office designation the names of all candidates for that position shall be listed. . . . If the position is a partisan position, the party preference or independent status of each candidate shall be listed next to the candidate. The party preference must be listed exactly as provided by the candidate on the declaration of candidacy unless limited space on the ballot necessitates abbreviation or the party designation provided is, in the opinion of the county auditor, obscene. . . .

STATEMENT

In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), this Court invalidated California's blanket primary election system as unconstitutionally burdening political parties' First Amendment rights of association and expression. This case turns on whether the First Amendment principles of *Jones* apply with equal force to Washington's "modified" blanket primary.[1]

In *Jones*, this Court ruled that state government is prohibited from forcing a political party to associate with non-party members at the critical stage of selecting its standard-bearer in the general election. Following this Court's decision in *Jones*, the Ninth Circuit struck down Washington's prior version of the blanket primary. *Democratic Party v. Reed*, 343 F.3d. 1198 (2003), *cert. denied*, 540 U.S. 1213, *cert. denied sub nom. Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957 (2004).

Washington voters adopted Initiative 872 ("I-872") in 2004, creating a new partisan primary election for Washington State. This modified blanket primary continued the essential elements of the unconstitutional system that preceded it. It forced the Republican Party to have its standard-bearer for the general election chosen by unaffiliated and rival party voters and compelled the Republican Party to accept as candidates any individual who sought to appropriate the Party's name.

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[1] The Washington State Grange has filed an independent petition for writ of certiorari in Case No. 06-713.

The District Court expressly described I-872 as indistinguishable "[i]n all constitutionally relevant aspects" from the prior version of the blanket primary, and permanently enjoined its implementation. State App. 72a, 93a-96a. The Ninth Circuit concluded that I-872 continued the "constitutionally crucial" flaw of the old blanket primary, which severely burdened the parties' First Amendment rights. State App. 19a-20a.

Essentially, the State's petition asks this Court whether it really meant what it said in *Jones* and the rest of its long line of cases upholding the right of political parties to limit nonmembers' participation in the selection of the parties' standard bearers in the general election. *See, e.g., Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party*, 479 U.S. 208 (1986); *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981).

REASONS FOR DENYING THE PETITION

I. This Court Has Previously Declined to Review Washington's Prior, Constitutionally Indistinguishable Primary.

Washington provides no reason this Court should devote scarce judicial resources to review the Court of Appeals decision. I-872 is constitutionally indistinguishable from Washington's prior blanket primary, which the Ninth Circuit struck down based on this Court's clear statement of First Amendment principles in *Jones*. This Court twice declined to grant *certiorari* in that case. *See Reed*, 540 U.S. 1213; 541 U.S. 957.

The State's contention that "I-872 establishes a 'nonpartisan primary' exactly meeting the Court's description," Pet. at 11, is contradicted by I-872's express language, Washington's election administrators' official statements, and substantial portions of the rest of Washington election law. I-872 expressly applies only to primary elections for "partisan office": "Whenever candidates for partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter." State App. 117a (I-872, § 7(2)).

In contrast to the State's insistence that "Initiative 872 eliminates the use of the primary to nominate political party candidates for office," Pet. at 9, Washington elections officials uniformly responded to inquiries regarding the initiative's effect on partisan nominations by stating that they were "not aware of any language associated with the Initiative that contemplates a partisan nomination process separate from the primary." Ct. App. ER 46-53.[2]

The notion that I-872 is a nonpartisan primary is further contradicted by numerous other provisions of Washington's election law. For example, the pre-primary election notice that county auditors are required to publish must contain "the proper party designation" of each

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[2] Equating "nomination" with "endorsement," the State concedes that I-872 eliminates the Party's right to nominate its candidates. Pet. at 9. This alone renders I-872 constitutionally defective: "The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee." *Jones*, 530 U.S. at 580. In *Reed*, the Ninth Circuit aptly noted that "[t]he right of people adhering to a political party to freely associate is not limited to getting together for cocktails and canapés. Party adherents are entitled to associate to choose their party's nominees for public office." *Reed*, 343 F.3d at 1204.

candidate. WASH. REV. CODE § 29A.52.311. "Major political party" status depends "at least one nominee for president, vice president, United States senator, or a statewide office receiv[ing] at least five percent of the total vote cast." WASH. REV. CODE § 29A.04.086. United States senator and partisan statewide offices are all subject to I-872. State App. 116a (I-872, § 4). A legislator's ability to raise campaign money depends, in part, on being a "member[] of a major political party in the state senate or state house of representatives." WASH. REV. CODE § 42.17.020(10); *see also* WASH. REV. CODE § 42.17.640(2). I-872 itself recognizes that the candidates advanced under the primary are "of" the Republican Party. State App. 123a (I-872, § 15(2)) (describing the effect of a vacancy upon "the term of the successor who is *of the same party* as the incumbent" (emphasis added)).[3]

The legislative history underlying the initiative also shows that compliance with this Court's description of a "nonpartisan blanket primary" in *Jones* was never the intent of I-872. Instead, the intent was to legislatively overrule the federal courts and re-institute the old blanket primary under a different name. The sponsor's initial press release announced: "Grange files initiative to *preserve* state's primary system." Ct. App. ER 512 (emphasis

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[3] The State incorrectly asserts that, under I-872, the only distinction between partisan and nonpartisan offices is the candidate's unilateral ability to associate with a political party. Pet. at 12, n.5. The offices are also distinguished by the process for filling vacancies and a candidate's ability to raise and spend campaign funds. *See, e.g.*, WASH. CONST. art. II, § 15 (a political party is entitled to fill vacancy in partisan office); State App. 123a (I-872, § 15(2)); WASH. REV. CODE §§ 42.17.020(10) & .640(2) (caucus political committees, made up of legislators who are members of a "major political party," may contribute greater sums in election campaigns).

added).[4] I-872's sponsor also described the initiative as a "modified blanket primary," Ct. App. ER 18, promising voters that the "new" primary would look and operate much like the old blanket primary. Ct. App. ER 22, 28. The text of I-872 itself confirms its purpose – permitting "the people" rather than the Republican Party to choose which candidate (if any) will carry the Republican standard in the general election:

> The Ninth Circuit Court of Appeals has threatened [the blanket primary] system through a decision, which, if not overturned by the United States Supreme Court, may require change. In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective. . . .
>
> This act takes effect only if the Ninth Circuit Court of Appeals' decision in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003)[,] holding the blanket primary election system in Washington state invalid[,] becomes final and a Final Judgment is entered to that effect.

State App. 115a, 123a-124a (I-872, §§ 2, 18).

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[4] This Court will consider declarations of intent in evaluating the purpose of state laws impacting the First Amendment. *See Edwards v. Aguillard*, 428 U.S. 578, 586-87 (1987) (rejecting sham assertion of secular intent). Here the expressed intent of the initiative itself, as well as published statements by its sponsor, demonstrates its prohibited, invasive intent.

The official ballot statement in support of I-872 also makes clear that it did not create a "nonpartisan primary":

> Don't be forced to choose from only one party's slate of candidates in the primary.

Ct. App. ER 257. While modifying the former partisan blanket primary with wordplay, I-872 still enabled non-members to determine the identity of the Republican Party's standard-bearer. The sponsor contrasted the effect of I-872 with the primary election system enacted in response to the Ninth Circuit's decision in *Reed*:

> The September primary this year gave the state party bosses more control over who appears on our general election ballot at the expense of the average voter.

Ct. App. ER 257.

Washington's I-872 and California's Proposition 198, which established its former blanket primary, are similar in many respects. Both advanced similar "compelling interests." *Compare* State App. 114a-115a (I-872, § 2) (advancing the interests of voter privacy, participation, and choice) *with Jones*, 530 U.S. at 584 (advancing the interests, *inter alia*, of fairness, choice, participation, and privacy). Like Proposition 198, I-872 sought to ensure that candidates would appeal to a larger segment of the electorate: "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." Ct. App. ER 257; *see also* Ct. App. ER 22-23 ("This proposed initiative will ensure that the candidates who appear on the general election ballot are those who have the most support from the voters, not just the support of the political party leadership."). In *Jones*, this Court responded that a State's interests in

> producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns . . . are simply circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices . . . [and] reduce to nothing more than a stark repudiation of freedom of political association.

530 U.S. at 582.

Message modification was the intended result of both I-872 ("[Candidates] will not be able to win the primary by appealing only to party activists." Ct. App. ER 29) and Proposition 198 (forced association under the primary has "the *intended* outcome . . . of changing the parties' message." *Jones*, 530 U.S. at 581-82 (emphasis in original)). Observing the "obvious proposition" that the "voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from the party faithful," *Jones*, 530 U.S. at 578, this Court stated that an inevitable effect of the primary was to cause candidates to modify their message. "In effect, [the blanket primary] has simply moved the general election one step earlier in the process, at the expense of the parties' ability to perform the basic function of choosing their own leaders." *Id.* at 580 (internal quotation marks omitted).

There is another notable similarity between I-872 and Proposition 198. Under I-872, "[a] primary is a first stage in the public process by which voters elect candidates to public office. . . . [Party affiliation] may in no way limit the options available to voters." State App. 117a-118a (I-872, § 7(1) & (3)). Likewise, California's blanket primary was "the first step by which the electorate as a whole, regardless of party affiliation, chooses its leaders." *California*

Democratic Party v. Jones, 984 F. Supp. 1288, 1293 (E.D. Cal. 1997).

The State asserts that I-872 is constitutionally distinguishable from Proposition 198 and Washington's prior blanket primary because it "winnows" rather than "nominates" candidates. Pet. at 13. This was the same defense offered by Washington in its *amicus curiae* brief to the Court in *Jones*. The State described "the winnowing of candidates for the general election" as the only "aspect of party associational activities affected by the blanket primary." Brief of the States of Washington & Alaska as *Amici Curiae* in Support of Respondents, 1999 U.S. Briefs 401 at *10. The Ninth Circuit rejected a similar argument in *Reed*: "As for the . . . argument that the party nominees chosen at blanket primaries 'are the "nominees" not of the parties but of the electorate,' that is the problem with the system, not a defense of it." 343 F.3d at 1204 (footnote marker omitted). In this case, the Ninth Circuit observed that any distinction between "winnowing" and "nominating" is not "illuminating" because they are "two sides of the same coin" and this Court used the terms interchangeably in *Storer v. Brown*, 415 U.S. 724, 734 (1974). State App. 18a, n.14.

If anything, I-872 poses an even greater threat than Proposition 198 to core First Amendment rights of political parties. Under its implementing regulations to the initiative, the State confirmed that I-872 granted any candidate an unrestricted right to appropriate the Republican Party name on a primary election ballot. The Ninth Circuit noted:

> The emergency regulations promulgated by the Washington Secretary of State in May 2005 confirmed the parties' inability to control who runs using their name: "neither endorsement by a political party nor a nominating convention are [sic]

> required in order to file a declaration of candidacy and appear on the primary election ballot." WASH. ADMIN. CODE § 434-215-015 (2005).[5]

State App. 23a, n.18. In addition, the State mandated that a candidate's "party preference . . . be listed [on the ballot] exactly as provided by the candidate on the declaration of candidacy." WASH. ADMIN. CODE § 434-230-170 (2005) (Ct. App. ER 377-78).

The following hypothetical illustrates the potential harm to the Republican Party under I-872. Assume that seven candidates file for office as "Republicans" and evenly split seventy percent of the primary election vote. Assume further that only two candidates file as "Democrats" and evenly split thirty percent of the vote. Under I-872, there would be no Republican on the general election ballot, despite "Republican" candidates receiving seventy percent of the primary vote. State App. 117a (I-872, § 7(2)).

II. The Ninth Circuit's Decision Regarding Forced Association With Candidates or Voters Follows This Court's First Amendment Jurisprudence.

The Ninth Circuit's decision follows a long line of Supreme Court cases upholding the right of political parties to exclude nonmembers (or to include unaffiliated voters) in selecting party nominees for public office. *See, e.g., Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Tashjian v. Republican Party*, 479 U.S. 208 (1986); *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989); *Jones*, 530 U.S. at 575 ("[O]ur cases

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[5] The State neither cites nor comments on its emergency regulations in its petition.

vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences.'") (quoting *Eu*, 489 U.S. at 224); *Clingman v. Beaver*, 544 U.S. 581, 595 (2005) (upholding state prohibition on crossover voting by members of rival parties in primary because "opening the . . . primary to all voters regardless of party affiliation would undermine the crucial role of political parties in the primary process").

Unaffiliated and rival party voters are not free to cross party lines to support a particular candidate at the expense of the associational right of political party adherents to select their standard bearer. A "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." *Jones*, 530 U.S. at 583 (quoting *Tashjian*, 479 U.S. at 215-16, n.6). As in California, a "voter's desire to participate does not become more weighty simply because the State [of Washington] supports it." 530 U.S. at 583-84.

In rejecting California's defense of the blanket primary as "a rather pedestrian example of a State's regulating its system of elections," 530 U.S. at 572, this Court relied upon *La Follette*: "[W]hatever the strength of the state interests supporting the open primary itself, they could not justify [a] 'substantial intrusion into the associational freedom of members of the National Party.'" *Jones*, 530 U.S. at 576 (quoting *La Follette*, 450 U.S. at 126). California's blanket primary in *Jones*, Wisconsin's open primary in *La Follette*, Washington's blanket primary in *Reed*, and I-872's "modified" blanket primary all involve a "state-imposed burden" – the "intrusion by those with

adverse political principles upon the selection of the party's nominee." 530 U.S. at 576, n.7 (internal quotation marks omitted).

In *La Follette*, Democratic Party rules prohibited unaffiliated voters' participation in its presidential nomination process. Wisconsin sought to compel the Democratic Party to seat delegates to the Party's national convention who were chosen through an open primary, in which voters did not declare their party affiliation. The Party's rules prevailed over the contrary state statute: "It is for the National Party – and not the Wisconsin Legislature or any court – to determine the appropriate standards for participation in the Party's candidate selection process." *La Follette*, 450 U.S. at 124.

In *Tashjian*, Republican Party rules permitted independent voters to vote in Republican primaries. Connecticut required voters in any party primary to be registered members of that party. Again, the conflict was resolved in favor of the Party rule: "The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Tashjian*, 479 U.S. at 224.

Although the primary election systems in *La Follette* and *Tashjian* differed from each other and from California's blanket primary, this Court explicitly adopted the principles underlying both *La Follette* and *Tashjian* in *Jones*. The selection of a standard bearer by a political party is fundamental to its existence, and a State may not substitute its judgment for that of the political party in determining whether the party's message is advanced by the participation of unaffiliated voters, or not. *See Jones*, 530 U.S. at 581-82.

Clingman confirmed the important role that parties play and affirmed the validity of Oklahoma's prohibition of cross-over voting in a primary. Yet, forcing the Republican Party to associate with unaffiliated and rival party voters and accept cross-over voting is what I-872 is all about.[6]

Forced association with candidates seeking to appropriate the Republican Party mantle is also prohibited. "[B]eing saddled with an unwanted, and possibly antithetical, nominee would [ordinarily] . . . severely transform [a party]." *Jones*, 530 U.S. at 579. There is no principled distinction between being able to determine the scope of association with respect to voters selecting the Republican nominee, and candidates seeking to be that nominee. "[I]t is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views." *Jones*, 530 U.S. at 575. If the Party and its adherents consider a prospective candidate to be anathema to their views, he could hardly be the ambassador of those views.[7]

The Ninth Circuit has joined the District of Columbia and Eleventh Circuits in directly addressing the ability of candidates to foist themselves, unwanted, on a political

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[6] "Don't be forced to choose from only one party's slate of candidates in the primary." Ct. App. ER 257.

[7] In related First Amendment contexts, this Court has upheld the right of an association to exclude messages (and messengers) that the association deems inconsistent with its message. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (parade organizers had the right to exclude group whose message was deemed inconsistent by organizers, notwithstanding contrary state statute); *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000) ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").

party, and all have affirmed the right of the party to determine the scope if its association. In *LaRouche v. Fowler*, 152 F.3d 974, 995-96 (D.C. Cir. 1998), the court observed:

> [I]t is the *sine qua non* of a political party that it represents a particular political viewpoint. And it is the purpose of a party convention to decide on that viewpoint, in part by deciding which candidate will bear its standard: the liberal or the conservative, the free trader or the protectionist, the internationalist or the isolationist.
>
> * * *
>
> The Party's ability to define who is a "bona fide Democrat" is nothing less than the Party's ability to define itself.

Segregationist David Duke and his supporters have twice sought to compel the Republican Party to accept him as a candidate, even though his views are anathema to the Party, and twice the Eleventh Circuit rejected his claim. *See Duke v. Cleland*, 954 F.2d 1526 (1992); *Duke v. Massey*, 87 F.3d 1226, 1233, 1234 (11th Cir. 1996) ("Duke supporters do not have a First Amendment right to associate with him as a Republican Party presidential candidate. . . . Duke does not have the right to associate with an 'unwilling partner.'"). Instead, the Eleventh Circuit held that "[t]he Republican Party has a First Amendment right to freedom of association and an attendant right to identify those who constitute the party based on political beliefs." *Massey*, 87 F.3d at 1234.

In this case, the Ninth Circuit addressed the concern that I-872 enabled candidates to express their party "preference" on the ballot, "notwithstanding the political parties' unwillingness to associate with a particular

candidate or nominate that person as a standard bearer," State App. 24a, n.19:

> The Initiative thus perpetuates the "constitutionally crucial" flaw *Jones* found in California's partisan primary system. Not only does a candidate's expression of a party preference on the ballot cause the primary to remain partisan, but in effect it forces political parties to be associated with self-identified candidates not of the parties' choosing. This constitutes a severe burden upon the parties' associational rights.

State App. 19a-20a.[8]

III. Wherever the First Amendment Boundary Between Permissible and Impermissible State Regulation of Primary Elections May Lie, I-872's Forced Association with Unaffiliated Voters and Candidates Is Impermissible.

Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest. *Clingman*, 544 U.S. at 586. The State's petition offers no compelling interests justifying I-872, but its severe burden on the Republican Party is indisputable.

I-872 forces the Republican Party to associate with both voters and candidates who may not share its positions or goals, and who may, in fact, be actively opposed to the Party's principles. Changing the Republican message

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[8] This Court has recognized that a political party does not have the unilateral right to identify a candidate as its nominee. The association must be mutual. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359-60 (1997).

by changing the candidates carrying the Republican name in the general election was the expressed intent of I-872. "This proposed initiative will ensure that the candidates who appear on the general election ballot are those who have the most support from the voters, not just the support of the political party leaders." Ct. App. ER 22-23. "[F]orced association has the likely outcome – indeed, in this case the *intended* outcome – of changing the parties' message. We can think of no heavier burden on a political party's associational freedom." *Jones*, 530 U.S. 581-82.

CONCLUSION

This Court has already provided clear, consistent guidance on the limits of state power to compel political parties to include rival party or unaffiliated voters when selecting their standard-bearers. I-872 forces the Republican Party to have its standard-bearer in the general election selected by persons who are, at best, wholly unaffiliated with the party and, at worst, active affiliates of a rival party.

This Court has also provided clear guidance on the right of associations to determine the scope of their association, and to exclude those *the association* defines as outside it. The lower courts have consistently held that the right of association permits political parties to exclude candidates who might wish to assume the party mantle.

Both the Ninth Circuit and the District Court understood this Court's decisions. Any confusion the State may

have is of its own making, and a further opinion would provide no greater clarity.

Respectfully submitted,

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December 26, 2006

Nos. 06-713 & 06-730

IN THE

Supreme Court of the United States

WASHINGTON STATE GRANGE,

Petitioner,

-and-

WASHINGTON, *et al.*,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT LIBERTARIAN PARTY OF WASHINGTON

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QUESTIONS PRESENTED

1. Have the Petitioners properly raised any compelling reason for review, when the Ninth Circuit held that the "top-two primary" system adopted by Washington voters—which system unconstitutionally converts political party names to the State's own use and forces political parties to be associated with self-identified candidates not of the parties' choosing—is not the kind of "nonpartisan blanket primary" approved in *California Democratic Party v Jones*, 530 U.S. 567 (2000)?

2. Is Washington's "top two primary" also unconstitutional on other grounds because it requires far more than a "modicum of support" for access to the general election ballot as limited by *Storer v Brown*, 415 U.S. 724 (1974), and/or because it adds artificial qualifications for federal office, contrary to *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995)?

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STATEMENT OF THE CASE

Ever since it became a state Washington has had a partisan election system in which voters at the general election chose between representatives of political parties.[1] Initially candidates were chosen either by convention or by petition. In 1907, Washington established a direct primary system.[2] In this system separate ballots were printed for each political party and voters could only cast ballots in one party's primary.[3]

In 1935 Washington established a "blanket primary" system, in which any voter could vote for "any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter."[4] This system survived two legal challenges,[5] but failed in 2003 on the third challenge.[6]

On November 2, 2004, the voters approved Initiative 872. By the sponsor's[7] own admission, Initiative 872 was

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[1] A detailed history of primary election law in Washington State is set forth in Part V of *Washington State Republican Party v. Logan*, 377 F. Supp. 2d 907 (W.D. Wash. 2005)(Washington State Grange's Appendix, at 40a-48a)(hereinafter "Grange Appendix")

[2] *State ex rel. Wells v. Dykeman*, 70 Wash. 599, 127 P. 218 (WA 1912)

[3] Grange Appendix, at 40a (Petitioner Washington State's Appendix substantially duplicates the Grange Appendix.)

[4] R.C.W. § 29.18.200 (2003)

[5] *Anderson v. Milliken*, 59 P.2d 295 (WA 1936), and *Heavey v. Chapman*, 611 P.2d 1256 (WA 1980)

[6] *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003), cert. den. 540 U.S. 957, and cert. den. 541 U.S. 957 (2004)

[7] The prime sponsor of Initiative 872 was a Petitioner here, the Washington State Grange.

designed to give "voters the kind of control that they exercised for seventy years under the blanket primary."[8]

On May 19, 2005, the Libertarian Party of Washington sought and was later granted leave to intervene in this action challenging Initiative 872. The Libertarian Party alleged, *inter alia*, that Initiative 872 is "unconstitutional because it 'places impermissible limits on access to the general election ballot' contrary to the United States Constitution, and allows a person to appropriate the Libertarian Party label without compliance with its nominating rules and without allowing the Party to define what the Party label means."[9]

On July 15, 2005, the district court held Initiative 872 was unconstitutional because it: (1) forces political parties to have their nominees selected by voters unaffiliated with them, and (2) by forcing political parties to associate with candidates who merely express a "party preference."[10] On August 22, 2006, the Ninth Circuit affirmed, finding that Initiative 872 "forces political parties to be associated with self-identified candidates not of the parties' choosing."[11] Neither the district court nor the Ninth Circuit reached the ballot access claims raised by the Libertarian Party.[12]

In its petition to this Court the State of Washington (hereinafter "State") claims Initiative 872 established a "top

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[8] Ct. App. ER 29. And compare, Initiative 872, § 5,(Grange Appendix, at 118a), with R.C.W. § 29.18.200 (2003), n 4, supra

[9] Grange Appendix, at 37a-38a

[10] Grange Appendix, at 79a

[11] *Washington State Republican Party v Washington*, 460 F.3d 1108 (9th Cir. 2006)(hereinafter "*Wa. St. Rep. Pty.*")(Grange Appendix, at 20a)

[12] Grange Appendix, at 33a, 84a

two" primary election system "broadly similar" to the one used in Louisiana,[13] apparently implying that the Louisiana system—and hence Initiative 872—may be deemed constitutional under the reasoning of *Foster v Love*.[14] However, *Foster* was decided under the supremacy clause, not the First Amendment.[15]

Petitioner Washington State Grange (hereinafter "Grange") concedes that Initiative 872 applies only to "*partisan* office"[16] and that "the primary selects the two most popular candidates for the November ballot." (emphasis in original).[17] Paradoxically, the State asserts "I-872 establishes a '*non-partisan* primary' exactly meeting the Court's description" in *California Democratic Party v Jones*.[18] The State claims further that it is a primary in which party affiliation plays "no role" or "no part" in qualifying candidates for the general election ballot.[19]

The Grange acknowledges the significance of *partisan* labels as a "shorthand description of the candidate's views 'on matters of public concern' as well as the candidate's 'substantive and ideological positions.'",[20] but argues that candidates' First

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[13] Washington State's Petition for Writ of Certiorari, at 11(hereinafter "State Pet.")

[14] 522 U.S. 67 (1997)

[15] Even under the supremacy clause there is a constitutionally fatal difference between the two systems. See, "Initiative 872 Violates Federal Law For Federal Offices," infra.

[16] Washington State Grange's Petition for Writ of Certioari, at 8-10 (hereinafter "Grange Pet.")

[17] Grange Pet., at 10

[18] 530 U.S. 567 (2000) (State Pet., at 11)

[19] State Pet., at 8, 9 and 12

[20] Grange Pet., at 17 (footnote omitted) By conceding party designations connote "substantive and ideological positions," the (Cont'd)

Amendment speech rights allow them to declare their "party preferences" regardless what effect those declarations may have on the associational rights of the political parties.[21] Meanwhile the State downplays the significance of *partisan* labels, conceding only that they are "some information that voters may find useful . . ."[22] and argues instead that a candidate statement of party preference "in no sense makes them the 'nominees' or 'standard bearers' of those parties."[23]

REASONS FOR DENYING THE PETITIONS:

A. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT INITIATIVE 872 DID NOT CREATE A "NON-PARTISAN BLANKET PRIMARY" AUTHORIZED BY JONES

It may be true, as the State claims, that Initiative 872 was "designed in specific response" to the *Jones* decision.[24] But that merely renders the motivations of the drafters all the more suspect.[25] As the Ninth Circuit explained, Initiative 872 diverges significantly from the "*non-partisan blanket primary*" visualized by *Jones*[26] because it retains the crucial

(Cont'd)

Grange implicitly concedes that Initiative 872 creates the same problem addressed by this Court in *Jones*, i.e., the ability to destroy a party by permitting candidates who do not share its core values to become its standard-bearer. *Jones*, 530 U.S. at 581-582

[21] Grange Pet., 17-19.

[22] State Pet., at 12.

[23] State Pet., at 17.

[24] State Pet., at 11.

[25] "Some urban voters might think that special protection for rural water and electricity concerns serve a 'special interest' of farmers, and that the Grange is a special interest group." *Reed*, 343 F.3d at 1204.

[26] 530 U.S. at 585.

concept of partisanship within the primary at the expense of political party rights.[27]

This Court noted in *Jones* that states may condition access to a "*non-partisan blanket primary*" ballot in part on prior and independent nomination by an established political party.[28] But Initiative 872 involves no such mechanism to accommodate nominations by a political party. Instead, Initiative 872 converts partisan nominations to the state's own use, by relegating political party nominations to the status of endorsements,[29] and allowing any person to appear on the primary ballot showing his or her personal "party preference." If the candidate is one of the two top vote getters, he or she may emerge as the only one bearing that party designation in the general election.[30]

Contrary to the assertions of the State, party labels do provide a "shorthand designation of the views of party candidates on matters of public concern . . ."[31] The Ninth Circuit observed:

> [v]oting studies conducted since 1940 indicated that party identification is the single most important influence on political opinions and voting. . . . [T]he tendency to vote according to party loyalty increases as the voter moves down

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[27] Grange Appendix, at 19a-20a.

[28] 530 U.S. at 585-86.

[29] "The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee." *Jones*, 530 U.S. at 580.

[30] Initiative 872, §§ 7, 9(Grange Appendix, at 119a-121a).

[31] *Tashijan v. Republican Party*, 479 U.S. 208, 220 (1986).

> the ballot to lesser known candidates seeking lesser known offices at the state and local level.[32]

Thus, the Ninth Circuit concluded, "to the extent Initiative 182 (sic) allows candidates to self-identify with a particular party-even if only as a 'preference'-it cloaks them with a powerful voting cue linked to that party."[33] As the Ninth Circuit noted, the Washington Secretary of State recognized the significance of "party preferences" by amending the Washington Administrative Code to prohibit candidates from changing their "party preference" between the primary election and the general election.[34]

The Grange claims that candidates have a First Amendment speech right to declare their "party preference" regardless whether the party agrees.[35] At no place in these proceedings has the Grange alleged or shown that it is a candidate or has any standing to represent a candidate whose speech rights may be implicated.[36] Even if the Grange has standing to raise the First Amendment rights of candidates, the district court correctly noted: "A candidate's free speech right to express a 'preference' for a political party does not extend to disrupting the party's First Amendment associational rights."[37]

Neither the State nor the Grange argued with any vigor that the State had a compelling or narrowly tailored interest

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[32] Grange Appendix, at 21a (*quoting Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992)).

[33] Grange Appendix, at 22a.

[34] Grange Appendix, at 20a-21a, n 16.

[35] Grange Pet., at 17-19.

[36] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)(party must have "standing" to raise claim or defense).

[37] Grange Appendix, at 69a (citing *Storer v. Brown*, 415 U.S. 724, 736, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)).

to justify this severe burden on the political parties.[38] Neither was the offending aspect of Initiative 872 servable.[39] Consequently, the Ninth Circuit correctly determined that Initiative 872 was unconstitutional in its entirety.

B. INITIATIVE 872 DOES NOT RESPECT THE RIGHTS OF POLITICAL PARTIES

"Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."[40] "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."[41] "[A] nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications."[42]

> "[A] single election in which the party nominee is selected by nonparty members could be enough to destroy the party. . . . Ordinarily, however, being saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it. '[R]egulating the

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[38] Grange Appendix, at 30a.

[39] *Id.*, at 30a-33a.

[40] *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 n.22, (1981) (quoting Laurence H. Tribe, *American Constitutional Law* 791 (1978)).

[41] *Roberts v. United States Jaycees*, 468 U.S. 609, 633 (1984)(O'Connor, J., concurring in part and concurring in the judgment).

[42] *Tashijan*, 479 U.S. at 215 n.6.

> identity of the parties' leaders,' we have said, 'may . . . color the parties' message and interfere with the parties' decisions as to the best means to promote that message.'" [43]

The Ninth Circuit recognized "[t]he principle underlying the breadth of the right of association is one of mutuality: both the putative party member and the political party must consent to the associational tie." [44] Despite more than six years of continuing litigation in Washington State, no litigant and no court involved has yet identified a single case authority that even hints a political party may not prevent unacceptable candidates from using its label. Initiative 872 deprives them of that right.

C. THIS COURT HAS PROVIDED PROPER AND ADEQUATE GUIDANCE FOR DISPOSITION OF THIS CASE

The State argues it lacks sufficient guidelines from this court to design a constitutionally sound election system.[45] The Grange argues the Ninth Circuit overstepped the boundaries of judicial restraint.[46] Both are wrong.

"It is too plain for argument, and it is not contested here, that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention." [47] Thus, states have

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[43] *Jones*, at 530 U.S. at 579, (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231, n. 21 (1989).

[44] Grange Appendix, at 13a.

[45] State Pet., at 18-20.

[46] Grange Pet., at 22-29.

[47] *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (U.S. 1974) (citing to *Storer v. Brown*, 415 U.S. 724, 733-736 (1974)).

considerable flexibility in designing partisan election systems—having the option of using either primaries or conventions, together with several permutations of each—so long as they provide some discrete mechanisms for political parties, large and small, to select the "standard bearer who best represents the party's ideologies and preferences."[48]

A state can also opt for a completely nonpartisan system, without any political party recognition or involvement. Some Washington State offices, such as all judicial offices and Superintendent of Public Instruction, are already fully nonpartisan.[49] But Initiative 872 does not convert other state offices to nonpartisan offices. Instead, it steals partisan identities from the political parties and denies the political parties any meaningful mechanism by which to protect or define those identities.[50]

Once a State opts for a partisan election system it must protect the integrity of party labels. In *Clingman v. Beaver*[51] this Court recently limited the rights of political parties even to dilute the meaning of their own party labels. This Court held that party labels could mislead voters if other voters could register as members of one party and vote in another party's primary.[52] This same concern influenced *Timmons v. Twin Cities Area New Party*.[53] This Court was concerned that "members of a major party could [use 'fusion' candidacies

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[48] *Eu*, 489 U.S. at 224.

[49] Initiative 872 § 4 (Grange Appendix 117a)(judicial offices non-partisan), R.C.W. § 29A.52.111(Superintendent of Public Instruction non-partisan).

[50] Initiative 872, §§ 4,5,7,9 (Grange Appendix, at 117a-121a).

[51] 544 U.S. 581 (2005).

[52] *Clingman*, 544 U.S. at 595.

[53] 520 U.S. 351 (1997).

to] . . . undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising."[54]

Thus, this Court has prevented political parties from inviting members of other political parties to participate in their primaries and from nominating candidates associated with other parties, despite earlier holding that "courts may not interfere [with First Amendment expressions of political parties] on the ground that they view a particular expression as unwise or irrational."[55] As the district court and the Ninth Circuit both recognized, and this court has consistently held, First Amendment rights would mean little if *anyone* may, in the exercise of his or her own First Amendment rights, interfere with the First Amendment rights of *another.*

Contrary to the intimations of the Grange, the judicial doctrines of separation of powers and federalism are not licenses for states to violate constitutional rights. "It is emphatically the province and duty of the judicial department to say what the law is."[56] "[This Court has] continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution."[57]

D. INITIATIVE 872 IS UNCONSTITUTIONAL ON OTHER GROUNDS

Even if this Court somehow concludes the First Amendment rights of political parties are not severely burdened and the state's interests are sufficiently weighty to validate unilateral candidate statements of "party preference", Initiative 872 is still unconstitutional.

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[54] *Timmons*, 520 U.S. at 365.

[55] *La Follette*, 450 U.S. at 123-124.

[56] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[57] *Jones*, 530 U.S. at 573.

I-872 Deprives the Libertarian Party Of Reasonable Ballot Access Rights

> For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. The right derives from the First and Fourteenth Amendments and advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences.[58]

In one sweeping move Initiative 872 eliminates all of the third party and independent ballot access jurisprudence developed by this court over the last 40 years.

First, Initiative 872 provides only one route to a partisan general election ballot. Those who advance to the general election ballot may be of the same party or of different parties, but to "qualify"[59] for the general election ballot one must participate in the primary established by Initiative 872.

The number and reasonableness of alternative routes to the general election ballot has been a major factor in the result of several ballot access cases.[60] *Burdick v. Takushi*,[61] upheld

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[58] *Norman v Reed*, 502 U.S. 279, 288 (U.S., 1992) (citing to *Anderson v. Celebrezze*, 460 U.S. 780, 793-794 (1983); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)).

[59] The State openly argued before the Ninth Circuit that Initiative 872 created a "qualifying primary." See, Brief of Appellants, State of Washington, et al., at 5, 26, 29, 32, 48 (*Wa. St. Rep. Pty v. Washington*, 9th Cir., 05-35780)(2003).

[60] E.g., *Jenness v. Fortson*, 403 U.S. 431 (U.S., 1971), *Storer*, supra, *Am. Party of Tex.*, supra, and *McCarthy v. Briscoe*, 429 U.S. 1317, 1320 (U.S., 1976).

[61] 504 U.S. 428 (1992).

Hawaii's elimination of write-in candidacies in part because Hawaii had three alternative and relatively easy routes to the ballot. None of the ballot access cases decided by this Court suggest that a state may provide only one route to a partisan general election ballot.[62] Even the "*nonpartisan blanket primary*" paragraph in *Jones*,[63] the meaning of which is disputed in this case, contemplated two alternative routes to the general election ballot.

> The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. . . . Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams v Rhodes*.[64]

By providing only one route to the general election ballot Initiative 872 "treat[s] things that different as though they are exactly alike", and thus discriminates against "new or small political organizations" such as the Libertarian Party.[65]

Second, nothing in any of the ballot access cases decided by this Court suggests that a state can require more than a "modicum of support" from voters for access to a partisan general election ballot. This Court has signaled that 5% of

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[62] *Foster v. Love*, supra, the only Supreme Court case addressing an election system even remotely similar to Initiative 872, concerned "the day" for federal elections, not access to the final ballot.

[63] 530 U.S. at 585

[64] *Jenness*, 403 U.S. at 442 (citing to *Rhodes*, 393 U.S. 23 (1968))

[65] *Id.*

the electorate is probably as high a threshold as it is likely to approve.[66]

Not only is the general election ballot access threshold under Initiative 872 well in excess of the 5% standard established by *Storer*, it is a moving target. Indeed, the actual number of votes necessary to determine whether one advances to the general election ballot is incapable of determination until *after* the "qualifying event" has taken place!

"[A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law."[67] A statute is unconstitutionally vague if it does not give "a person of ordinary intelligence fair notice" of the statute's requirements.[68] The void-for-vagueness doctrine applies to laws regulating conduct protected by the First Amendment.[69]

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.[70]

By limiting the number of routes to the general election ballot to one only, and by limiting the number of partisan candidates who may appear on the general election ballot to two only, two who by definition must show far more than a "modicum of

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[66] *Storer v Brown*, 415 U.S. 724, 739 (1974)(footnote omitted).

[67] *Baggett v. Bullitt*, 377 U.S. 360, 367, (1964) (citations omitted).

[68] *United States v. Harriss*, 347 U.S. 612, 617 (1954).

[69] *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

[70] *Williams v Rhodes*, 393 U.S. 23, 31 (1968).

support" to "qualify" for the general election ballot, Initiative 872 undermines the very rights that *Williams v. Rhodes* and its progeny have recognized and protected.

Initiative 872 Violates Federal Law For Federal Offices

Initiative 872 has added an unconstitutional "qualification of membership" in Congress. The State itself has called Initiative 872 a "qualifying primary."[71]

While it may be "too plain for argument" that states "may insist that intraparty competition be settled before the general election,"[72] nothing in the Constitution or in any act of Congress authorizes states to use primaries as qualifying mechanisms for candidates for federal office. Indeed, states do not have the power to adopt their own qualifications for congressional service, and the power to add qualifications for the offices of congressman and senator is not part of the original powers of sovereignty that the Tenth Amendment reserved to the states.[73]

The primary contest created by Initiative 872 is an "artificial distinction" that limits "the number capable of election" that James Madison warned against almost 220 years ago.[74] It neither nominates nor elects anyone. It qualifies candidates for the constitutionally relevant event to be held later, when there is no other way to qualify. It means that candidates who may be relatively unknown or unfamiliar on the day of the primary, but who may otherwise qualify for

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[71] *See* n. 59, supra.

[72] *Am. Pty. Of Tex.*, supra.

[73] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

[74] 2 Records of the Federal Convention of 1787, at 249-250 (cited in *Powell v McCormack*, 395 U.S. 486, 533-534 (1969)).

the office, will never be on the general election ballot, despite the intervention of time and possibly crucial events.[75]

In addition, Initiative 872 violates this court's holding in *Foster v. Love*,[76] by expanding the time for elections beyond "the day" provided for federal elections, to several weeks. Under Initiative 872 the disputed primary, held in September,[77] is but the "first stage in the public process by which voters elect candidates to public office."[78] The final "stage" is a general election on the first Tuesday after the first Monday of November.[79] Louisiana's "first stage" election is held on the same day as Washington's general election, with runoffs held later.[80] There is nothing in the U.S. Constitution or the United States' Code allows federal elections to be held in two stages. But Initiative 872 creates an election held in two stages.

The United States Constitution authorizes Congress to preempt state law regarding the time, place and manner of elections.[81] Under that power Congress has determined that Representatives, Senators and Presidential electors should all be elected on the second Tuesday of the November in each affected year.[82] Congress has also preempted state law

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[75] For example, a "Donna Rice affair" can easily "break" a front-runner overnight. Or, perhaps, voters might be forced to "Vote for the Crook" in order to avoid election of a segregationist.

[76] 522 U.S. 67 (1997).

[77] Initiative 872 § 8, (Grange Appendix, at 120a) and compare, R.C.W. § 29A.04.311.

[78] Initiative 872 § 7(1), (Grange Appendix, at 119a).

[79] R.C.W. § 29A.04.321.

[80] *Foster v Love*, supra.

[81] Art. I, § 4, cl. 1.

[82] 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1.

by providing, in the event no candidate obtains a majority or other "failure to elect" a state may hold a "runoff" after the general election.[83] *Foster v. Love* held that the first Tuesday after the first Monday in November of even numbered years was "the day" for federal elections.[84]

The State even argued to the Ninth Circuit, "[t]he general election is a 'runoff' between the two candidates gaining the most votes in the primary."[85] But to the extent runoffs may be necessary they must be held after "the day" for federal elections.[86] Therefore Initiative 872 violates federal law as to the time of elections for federal offices because the general election is effectively moved to September.[87]

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[83] 2 U.S.C. § 8; and see, *Foster v. Love*, 522 U.S. 67, 71-72, n. 3.

[84] *Id.*, 522 U.S. at 71 (quotes in original).

[85] See, n. 59, supra.

[86] 2 U.S.C. § 8.

[87] Compare, *Jones*, 530 U.S. at 580 ("In effect, Proposition 198 has simply moved the general election one step earlier in the process . . .")(citation omitted).

CONCLUSION

For the foregoing reasons, the Libertarian Party of Washington opposes the Petitions of both the State of Washington and the Washington State Grange for a Writ of Certiorari.

Respectfully submitted,

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NO. ____ (18)

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON; ROB MCKENNA, ATTORNEY GENERAL; SAM REED, SECRETARY OF STATE,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; MICHAEL YOUNG; DIANE TEBELIUS; MIKE GASTON; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; J.S. MILLS, WASHINGTON STATE GRANGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

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United States Court of Appeals, Ninth Circuit.

WASHINGTON STATE REPUBLICAN PARTY; Diane Tebelius; Bertabelle Hubka; Steve Neighbors; Mike Gaston; Marcy Collins; Michael Young, Plaintiffs-Appellees,

and Washington State Democratic Central Committee; Paul Berendt; Libertarian Party of Washington State; Ruth Bennett; J.S. Mills, Plaintiffs-Intervenors-

Appellees,

v.

State of WASHINGTON; Rob McKenna, Attorney General; Sam Reed, Secretary of State; Washington State Grange, Defendants-Intervenors-Appellants.

Nos. 05-35774, 05-35780.

Argued and Submitted Feb. 6, 2006.

Filed Aug. 22, 2006.

Background: State political party brought § 1983 action for declaratory and injunctive relief, challenging constitutionality of state's modified blanket primary system, which was adopted through passage of initiative in general election, and other political parties intervened. The United States District Court for the Western District of Washington, Thomas S. Zilly, J., 377 F. Supp. 2d 907, granted political parties' motions for summary judgment and issued preliminary injunction barring enforcement of initiative, and subsequently made injunction permanent. State and initiative's sponsor appealed.

Holdings: The Court of Appeals, Fisher, Circuit Judge, held that:

(1) state system imposed severe burden on political parties' associational rights;

(2) state system violated political parties' association rights; and

(3) unconstitutional portions of initiative could not be severed under Washington law, and therefore initiative was unconstitutional in its entirety.

Affirmed.

Rob McKenna, Maureen A. Hart, Jeffrey T. Even and James K. Pharris (argued), Office of the Washington Attorney General, Olympia, WA, for the State of Washington (defendant-intervenor-appellant).

Thomas F. Ahearne (argued), Ramsey Ramerman and Rodrick J. Dembowski, Foster Pepper & Shefelman PLLC, Seattle, WA, for the Washington State Grange (defendant-intervenor-appellant).

John J. White, Jr. (argued) and Kevin B. Hansen, Livengood, Fitzgerald & Alskog, Kirkland, WA, for the Washington State Republican Party (plaintiff-appellee).

David T. McDonald (argued) and Jay Carlson, Preston Gates & Ellis, LLP, Seattle, WA, for the Washington State Democratic Central Committee (plaintiff-intervenor-appellee).

Richard Shepard (argued), Shepard Law Office, Inc., Tacoma, WA, for the Libertarian Party of Washington State (plaintiff-intervenor-appellee).

Appeal from the United States District Court for the Western District of Washington; Thomas S. Zilly, District Judge, Presiding. D.C. No. CV-05-00927-TSZ.

Before D.W. NELSON, PAMELA ANN RYMER and RAYMOND C. FISHER, Circuit Judges.

FISHER, Circuit Judge.

For the second time in three years, political parties in Washington State are challenging the constitutionality of their state's partisan primary system, which was enacted as a result of the passage of Initiative 872 in the November 2004 state general election. In 2003, we concluded that Washington's previous "blanket" primary system was unconstitutional because it was "materially indistinguishable from the California scheme held to violate the constitutional right of free association in *Jones*." *Democratic Party of Wash. v. Reed*, 343 F.3d 1198, 1203 (9th Cir. 2003) (relying on *Cal. Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000)).

There are differences between Washington's pre-*Reed* blanket primary and the "modified" blanket primary being challenged in this case, and we are mindful that Initiative 872 reflects the political will of a majority of Washington voters. Nonetheless, although attempting to craft a primary system that does not unconstitutionally burden political parties' right of association under the First and Fourteenth Amendments, Initiative 872 fails to do so. Rather, the Initiative retains a partisan primary, in which each candidate may self-identify with a particular party regardless of that party's willingness to be

associated with that candidate. The State of Washington and Initiative 872's sponsor, the Washington State Grange (the Grange),[1] have not identified any compelling state interests-apart from those the Supreme Court rejected in *Jones*-that would justify the Initiative's severe burden on the political parties' associational rights; nor is Initiative 872's modified blanket primary narrowly tailored. We cannot sever the unconstitutional provisions from Initiative 872 because "it cannot reasonably be believed that" Washington voters would have passed Initiative 872 without its unconstitutional provisions. *McGowan v. State*, 148 Wash. 2d 278, 60 P.3d 67, 75 (2002). Accordingly, we hold that Washington's modified blanket primary as enacted by Initiative 872 is unconstitutional and affirm the district court's permanent injunction against the implementation of the Initiative.

I. BACKGROUND

To understand the flaw in Initiative 872's partisan primary system, it is helpful to review the nature and structure of the primary process in general. A political primary is often thought of as a "meeting of the registered voters of a political party for the purpose of nominating candidates . . ."; and a common definition of a primary election is a

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[1] The Washington State Grange is a subsidiary organization of the National Grange, which is described by its Washington chapter as "America's oldest farm-based fraternal organization" and as "a non-partisan, grassroots advocacy group for rural citizens with both legislative programs and community activities." Washington State Grange, *What is the Grange*, Official Website *at http://www.wa-grange.org/whats-the-grange.htm*.

"preliminary election in which voters nominate party candidates for office." American Heritage College Dictionary 1086 (3d ed. 2000). The Supreme Court has characterized a candidate nominated in a primary as the party's "standard bearer," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997), or "ambassador to the general electorate in winning it over to the party's views," *Jones*, 530 U.S. at 575, 120 S. Ct. 2402. In states that have adopted a "closed" primary system, each party (or traditionally at least each of the two major parties) selects its nominees who are to appear on the general election ballot as that party's candidates for particular offices. This type of primary is referred to as "closed" because only voters who formally associate themselves with a party in some fashion in advance of the primary may vote in that party's primary and thereby select the party's nominee. *See Jones*, 530 U.S. at 577, 120 S. Ct. 2402; *see also* Alexander J. Bott, Handbook of United States Election Laws and Practices: Political Rights 21, 43, 139 (1990).

Although many states employ a closed primary, other alternative primary systems have been and continue to be used in some states. One such alternative used to be the "blanket" primary, until the California version was held unconstitutional in *Jones*. In contrast to closed primaries where each party's nominee is selected by voters pre-affiliated with that party who vote only in that party's primary, a blanket primary system uses a common primary ballot shared by all candidates for particular elective offices. All voters, regardless of their own political party affiliations (if any),

could-until *Jones*-vote for any candidate appearing on the blanket primary ballot regardless of that candidate's designated political party affiliation.[2] The candidate who received the greatest number of votes in relation to other candidates with the same party affiliation would become that party's nominee who would advance to the general election ballot. For example, each of the Democratic and Republican candidates with the greatest number of votes in the blanket primary would appear as the only candidate identified with that particular party designation on the general ballot. *See Jones*, 530 U.S. at 570, 120 S. Ct. 2402. The Supreme Court, however, held that California's blanket primary violated the state political parties' right of association under the First and Fourteenth Amendments, because allowing nonparty members to vote for party candidates forced a party's members to associate with voters who were members of rival parties in the selection of that party's nominee for the general election. *See id.* at 577, 120 S. Ct. 2402.

Invoking *Jones*, the political parties in Washington challenged the blanket primary that had operated in that state since 1935. *See Reed*, 343 F.3d at 1201. Like the California primary, the Washington primary at issue in *Reed* advanced each of the top primary election vote-getters within the same party to the general election ballot. *See id.*[3] We

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[2] For example, a primary voter could "split the ticket" between a Republican gubernatorial candidate, a Democratic candidate for attorney general and a Libertarian candidate for secretary of state.

[3] "Minor" political parties were treated somewhat differently under Washington's pre-*Reed* blanket primary in

held Washington's blanket primary unconstitutional in 2003 because it was "materially indistinguishable from the California scheme" that the Supreme Court invalidated in *Jones*. *Id.* at 1203.[4]

In the aftermath of *Reed*, two parallel efforts ensued to create a replacement primary system-one undertaken by the Washington state legislature and the other a ballot initiative sponsored by the Grange. In January 2004, the Grange filed the text of what was to become Initiative 872 on the November 2004 Washington ballot with the Washington Secretary of State. Initiative 872 made a number of changes to Washington's previous blanket primary system; but significantly, it retained the partisan nature of the primary. As the official voters' pamphlet explaining Initiative 872 stated, the Initiative "concerns elections for *partisan* offices" and "would change the system used for conducting primaries and general elections for *partisan* offices." (Emphasis added.)[5]

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that they were allowed to avoid splintering their limited constituency at the blanket primary stage. They held their own nominating conventions prior to the blanket primary, and the single candidate each such minor party selected by convention would advance from the blanket primary to the general election ballot if he or she obtained at least one percent of the blanket primary vote. *See, e.g.*, Wash. Rev. Code §§ 29.24.020, 29.30.095 (1993).

[4] Although California explicitly labeled those candidates who advanced to the general elections as "the nominee of [a] party," *Jones*, 530 U.S. at 570, 120 S. Ct. 2402, a term Washington did not use, we concluded that Washington's avoidance of the label "nominee" was a "distinction[ ] without a difference." *Reed*, 343 F.3d at 1203.

[5] The Grange sponsored a website-*http://www.blanketprimary.org/*-as part of its advocacy efforts on behalf of

Two of the most important proposed changes were: (1) the redefinition of "partisan office" as "a public office for which a candidate may indicate a political party preference";[6] and (2) the adoption of a "top two" rule whereby the two candidates with the greatest number of votes in the primary advance to the general election regardless of their expressed party preference. Under the Initiative 872 primary system, therefore, those candidates expressing a particular party "preference" would be self-identified

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Initiative 872. In early 2004, the "Frequently Asked Questions" portion of that website characterized the primary system that would be enacted by the Initiative as follows:

> The proposed initiative would replace the current nominating system with a qualifying primary, similar to the nonpartisan primaries used for city, school district, and judicial offices. As in those primaries, the two candidates who receive the greatest number of votes would advance to the general election. Candidates for partisan offices would continue to identify a political party preference when they file for office, and that designation would appear on both the primary and general election ballots . . . .
>
> At the primary, the candidates for each office will be listed under the title of that office. the party designations will appear after the candidates' names, and the voter will be able to vote for any candidate for that office (just as they now do in the blanket primary).

[6] Ballots for partisan office under Washington's pre-*Reed* primary system simply listed a political party or independent designation next to a candidate's name. *See* Wash. Rev. Code § 29.30.020(3) (1993) (repealed 2004); *see also Reed*, 343 F.3d at 1201 & n.3.

only;[7] and the winner of the largest number of votes among candidates with the same party preference would no longer be guaranteed a place on the general election ballot-an entitlement limited to the two top vote getters overall. Indeed, two candidates with the same party preference could be the only candidates for a particular office appearing on the general election ballot.[8]

In March 2004, the Washington legislature adopted two alternative primary systems, subject to the outcome of the vote on Initiative 872 in the November 2004 general election. As its first choice, the legislature adopted a "top two" primary system similar, though not identical, to the one the Grange proposed in Initiative 872.[9] As a precaution in case the anticipated legal challenges to the "top two" system proved successful, the legislature also adopted a "backup" primary system-the so called "Montana" primary-which is essentially a type of open primary.[10]

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[7] The candidates' party preference designation on the ballot cannot be changed between the primary and general elections. *See infra* note 16.

[8] For example, if the 1996 gubernatorial primary had been conducted under the aegis of Initiative 872, two Democratic candidates-Gary Locke and Norman Rice-and no Republican candidate would have advanced from the primary to the general election.

[9] A "top two" primary is also sometimes referred to as a "Cajun" or "Louisiana" primary, after the only other state that employs a similar sort of primary.

[10] *Jones* described an open primary as follows:

Governor Gary Locke vetoed the "top two" primary system in April 2004, so the "Montana" primary became Washington's primary system for the fall 2004 elections. Nevertheless, Initiative 872 passed with nearly 60 per cent of the vote in the November 2004 general election and became effective as Washington law in December 2004. The Washington legislature did not pass any other measure concerning the state's primary system in the first half of 2005, although the secretary of state did promulgate emergency regulations relating to Initiative 872 in May 2005.

The Washington State Republican Party (the Republican Party) filed suit in federal district court in May 2005, seeking a declaratory judgment and injunctive relief under 42 U.S.C. § 1983 against a number of county auditors with respect to the enforcement of Initiative 872 and the conduct of primary elections. The Washington State Democratic Central Committee (the Democratic Party) and the Libertarian Party of Washington State (the Libertarian Party) moved to intervene as plaintiffs. The State of Washington and the Grange moved to intervene as defendants. The district court granted

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> An open primary differs from a blanket primary in that, although as in the blanket primary any person, regardless of party affiliation, may vote for a party's nominee, his choice is limited to that party's nominees *for all offices*. He may not, for example support a Republican nominee for Governor and a Democratic nominee for attorney general.

530 U.S. at 576 n.6, 120 S. Ct. 2402. *See also* Bott, *Handbook of United States Election Laws and Practices* 21, 138.

all of the motions to intervene and accepted the substitution of the State of Washington as a defendant in lieu of the county auditors, who dropped out as parties to this litigation.

In July 2005, the district court granted the political parties' motions for summary judgment and issued a preliminary injunction enjoining the enforcement of Initiative 872, *see Wash. State Republican Party v. Logan*, 377 F. Supp. 2d 907, 932 (W.D. Wash. 2005), and made the injunction permanent on July 29, 2005. Both the State of Washington and the Washington State Grange filed timely notices of appeal. We now affirm the district court's permanent injunction because the Initiative 872 primary unconstitutionally burdens the Washington state political parties' associational rights by permitting candidates to identify their party "preference" on the ballot, notwithstanding that party's own preference.[11]

II. DISCUSSION

A. Standard of Review

"We review a summary judgment [order] granting or denying a permanent injunction for abuse of discretion and application of the correct legal principles." *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1079 (9th Cir. 2004) (quoting *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987)). However, "any determination

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[11] The motion of FairVote-The Center for Voting and Democracy and others for leave to file a brief of *amici curiae* is granted, but we do not consider issues raised by amici that are beyond those argued by the parties.

underlying the grant of an injunction [is reviewed under] the standard that applies to that determination." *Ting v. AT & T*, 319 F.3d 1126, 1134-35 (9th Cir.2003). Accordingly, the district court's findings of fact are reviewed for clear error while questions of law are reviewed de novo. *See id.* at 1135.

The constitutionality of a state law is reviewed de novo. *See Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1103 (9th Cir. 2004). "[W]e review the application of facts to law on free speech questions de novo." *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1221 (9th Cir. 2003) (citing *Planned Parenthood v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1070 (9th Cir. 2002) (en banc)). Lastly, "severability is a question of state law that we review de novo." *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir. 2003) (per curiam).

B. Right of Association

"[T]he freedom to join together in furtherance of common political beliefs"-to form and join political parties-falls squarely within the right of association protected by the First Amendment and the Due Process Clause of the Fourteenth Amendment against interference by the states. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). "Representative democracy in any populous unit of governance is unimaginable without" such freedom. *Jones*, 530 U.S. at 574, 120 S. Ct. 2402. The right of association protects not only the activities of party stalwarts who

"devote substantial portions of their lives to furthering [their party's] political and organizational goals," but also the more limited associational ties of those who "limit their participation [in the party] to casting their votes for some or all of the [p]arty's candidates." *Tashijan*, 479 U.S. at 215, 107 S. Ct. 544. Indeed, even if "it is made quite easy for a voter to change his party affiliation the day of the primary," that eleventh hour "cross[ing] over" still constitutes an act of association in that the voter "must formally become a member of the party." *Jones*, 530 U.S. at 577, 120 S. Ct. 2402 (emphasis omitted).

The principle underlying the breadth of the right of association is one of mutuality: both the putative party member and the political party must consent to the associational tie. Accordingly, the freedom to associate necessarily includes some freedom to exclude others from the association. *See id.* at 574, 120 S. Ct. 2402. "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 n.22, 101 S. Ct. 1010, 67 L. Ed. 2d 82 (1981) (quoting Laurence H. Tribe, *American Constitutional Law* 791 (1978)). Neither voters nor political candidates can force a political party to accept them against the will of the party. *See Tashijan*, 479 U.S. at 215 n.6, 107 S. Ct. 544 ("[A] nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications."); *see also Duke v.*

Cleland, 954 F.2d 1526, 1531 (11th Cir. 1992) ("[David] Duke has no right to associate with the Republican Party if the Republican Party has identified Duke as ideologically outside the party.").

The right of association, however, especially when it intersects with the public electoral process, is not "boundless." *Clingman v. Beaver*, 544 U.S. 581, 589, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005). "States have a major role to play in structuring and monitoring the election process, including primaries." *Jones*, 530 U.S. at 572, 120 S. Ct. 2402. Constitutionally permissible state regulations touching upon political party affairs include those "requir[ing] parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion," "requir[ing] parties to demonstrate a significant modicum of support before allowing their candidates a place on [the general election] ballot" and "requir[ing] party registration a reasonable period of time before a primary election" in order to prevent "party raiding."[12] *Id.* (internal quotation marks and citations omitted). Accordingly, when we are faced with a state electoral law that allegedly violates associational rights:

> we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and

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[12] Party raiding is "a process in which dedicated members of one party formally switch to another party to alter the outcome of that party's primary." *Jones*, 530 U.S. at 572, 120 S. Ct. 2402.

> consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997) (internal quotation marks and citations omitted). Therefore, we must first determine whether Initiative 872 severely burdens the Washington political parties' associational rights; if it does, we must then determine whether a compelling state interest justifies that burden and whether Initiative 872 is narrowly tailored to further that state interest.

1. Severe burden

Washington and the Grange contend that Initiative 872 does not severely burden the political parties' associational rights. They point to dictum in *Jones* discussing with approval a *nonpartisan* blanket primary, *see* 530 U.S. at 585-86, 120 S. Ct. 2402, and argue that Initiative 872 created just such a primary. We disagree, because the primary under Initiative 872 is not the kind of nonpartisan election *Jones* contemplated.

The *Jones* dictum is found in that part of the opinion discussing the state interests California had

identified in defense of its blanket primary. The Court identified four legitimate state interests that might justify allowing voters to vote for any candidate regardless of the candidate's party affiliation-"promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy"-but denied that these were compelling reasons to burden political parties' associational rights "*in the circumstances of [that] case*." 530 U.S. at 584, 120 S. Ct. 2402. The Court went on to reason, however, that even if these four interests *were* compelling California's blanket primary was "not a narrowly tailored means of furthering them":

> Respondents could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot-which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State

> may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"-all without severely burdening a political party's First Amendment right of association.

Id. at 585-86, 120 S. Ct. 2402. In light of this statement, we agree that to the extent Initiative 872 can be fairly characterized as enacting a nonpartisan blanket primary, *Jones* would lead us to uphold Washington's modified blanket primary.[13]

Initiative 872 resembles the *Jones* hypothetical nonpartisan blanket primary in some respects, but it differs in at least one crucial aspect. On the one hand, the "top two" feature of Initiative 872 seems indistinguishable from that referred to in *Jones*, as does the aspect of Initiative 872 that allows "[e]ach voter, regardless of party affiliation, [to] vote for any candidate." 530 U.S. at 585, 120 S. Ct. 2402. However, the crucial point of divergence between Initiative 872 and *Jones* lies in the concept of partisanship. Although the Court did not specify in what sense it was using the term "nonpartisan," an election is customarily nonpartisan if candidates' party affiliations are not identified on the ballot. *See* Bott, Handbook of United States Election Laws and

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[13] The Republican Party emphasizes that the statement in *Jones* is only dictum. But as we have recognized, Supreme Court dicta is generally entitled to "great weight," *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 683 (9th Cir. 2004), and "appropriate deference," *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000). "[W]e do not blandly shrug them off because they were not a holding," *id.* (internal quotation marks omitted), and therefore we accord the *Jones* dictum the persuasive authority that it is due.

Practices 145 ("Nonpartisan elections are ones in which persons running for public office have their names listed on the ballot but not their party affiliation."). *Jones'* use of "nonpartisan" also appears to contemplate elections in which primary voters play no role in the nomination of any candidate as the representative of a political party. *See Jones*, 530 U.S. at 585-86, 120 S. Ct. 2402 (asserting that the "constitutionally crucial" element in the inquiry is the parties' choice of their own representative, and noting that states may condition access to a nonpartisan primary ballot in part on prior and independent nomination by an established political party). We therefore understand the Court to align the term "nonpartisan" with the process of nominating a candidate to appear on a general ballot, without thereby nominating a candidate to represent a political party as its standard bearer.[14]

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[14] The political parties argue that not only is Initiative 872 a partisan blanket primary, but it is indistinguishable from the primaries invalidated by *Jones* and *Reed* because it "nominates" candidates for the general election. Washington and the Grange counter that Initiative 872 merely "winnows" candidates. This debate is not particularly illuminating because "nominate" and "winnow" are two sides of the same coin-candidates who are not nominated are necessarily winnowed-and the Supreme Court has used both terms to describe the function of primaries. *See, e.g., Storer v. Brown*, 415 U.S. 724, 734, 735, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974) ("After long experience, California came to the direct party primary as a desirable way of nominating candidates for public office . . . . The direct party primary . . . functions to winnow out and finally reject all but the chosen candidates.").

Furthermore, even if Initiative 872's modified blanket primary can be said to "nominate" candidates, it does so in a way that is distinguishable from Washington's pre-*Reed* or

In contrast to the *Jones* hypothetical primary, the primary envisioned by Initiative 872 is still overtly partisan. The Initiative redefined the concept of "partisan office," but those offices remain partisan and so does the primary.[15] By including candidates' self-identified political party preferences on the primary ballot, Washington permits all voters to select individuals who may effectively become the parties' standard bearers in the general election. Whether or not the primary candidate is a party's nominee, any candidate may appear on the ballot showing that party as his or her "preference" and (if one of the two top vote getters) may emerge as the only one bearing that designation in the general election. Whether or not the party wants to be associated with that candidate, the party designation is a powerful, partisan message that voters may rely upon in casting a vote-in the primary and in the general election. The Initiative thus perpetuates the "constitutionally crucial" flaw *Jones* found in

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California's pre-*Jones* blanket primaries. Unlike those primaries, the top vote-getters in each party under Initiative 872 are not guaranteed a place on the general election ballot; candidates advance only if they finish in the top two overall. There is therefore a real possibility that one of the political parties' top vote-getters will not even make it into general election or that two candidates from the same party will advance. This is not a situation squarely contemplated by *Jones* or the cases upon which it relies, all of which share the underlying assumption that only one candidate emerges from a partisan primary as the party's nominee. *See Jones*, 530 U.S. at 575, 120 S. Ct. 2402 ("In no area is the political association's right to exclude more important than in the process of selecting *its nominee*.") (emphasis added) (citing cases).

[15] *See supra* note 5 and accompanying text.

California's partisan primary system. Not only does a candidate's expression of a party preference on the ballot cause the primary to remain partisan, but in effect it forces political parties to be associated with self-identified candidates not of the parties' choosing. This constitutes a severe burden upon the parties' associational rights.

Washington and the Grange argue against interpreting the Initiative 872 primary as partisan, and assert that a party "preference" is distinguishable from a party "designation" or some other stronger affirmative indication of party affiliation, such as membership. Such a distinction exists as a matter of logic, but it is not meaningful in the circumstances of this case. The district court came to the commonsense conclusion that "[p]arty affiliation plays a role in determining which candidates voters select, whether characterized as 'affiliation' or 'preference.' " *Wash. State Republican Party v. Logan*, 377 F. Supp. 2d 907, 926 (W.D. Wash. 2005). Washington urges that a candidate's political party preference simply provides "information for the voters." But a statement of party preference on the ballot is more than mere voter information. It represents an expression of partisanship and occupies a privileged position as the only information about the candidates (apart from their names) that appears on the primary ballot. Moreover, it also carries over onto the general election ballot.[16]

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[16] The Washington Secretary of State appears implicitly to have recognized that voters' reliance on candidates' party preferences was comparable to their reliance on candidates'

Importantly, "party labels provide a shorthand designation of the views of party candidates on matters of public concern . . . ." *Tashijan*, 479 U.S. at 220, 107 S. Ct. 544. Voters rely on party labels on the ballot in deciding for whom to vote. This political reality is illustrated by the Sixth Circuit's decision in *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992). *Rosen* held unconstitutional the provision in Ohio's election law that "prohibit[ed] nonparty candidates for elective office from having the designation Independent or Independent candidate placed on the ballot next to their name." *Id.* at 171. The court relied on evidence that

> [v]oting studies conducted since 1940 indicated that party identification is the single most important influence on political opinions and voting . . . . [T]he tendency to vote according to party loyalty increases as the voter moves down the ballot to lesser known candidates seeking lesser known offices at the state and local level.

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party designations, by amending Wash. Admin. Code § 434-230-040 (2005) to read as follows: "A candidate for partisan office who indicated a party preference on the declaration of candidacy *may not change the party preference between the primary election and the general election.*" (Emphasis added.) The regulation previously stated that "[n]o person who has offered himself or herself as a candidate for the nomination of one party at the primary, shall have his or her name printed on the ballot of the succeeding general election as the candidate of another political party." Wash. Admin. Code § 434-230-040 (1997).

Id. at 172. Thus voters "are afforded a 'voting cue' on the ballot in the form of a party label which research indicates is the most significant determinant of voting behavior." *Id.* Similarly, to the extent Initiative 182 allows candidates to self-identify with a particular party-even if only as a "preference"-it cloaks them with a powerful voting cue linked to that party.

Given that the statement of party preference is the *sole* indication of political affiliation shown on the ballot, that statement creates the impression of associational ties between the candidate and the preferred party, irrespective of any actual connection or the party's desire to distance itself from a particular candidate. The practical result of a primary conducted pursuant to Initiative 872 is that a political party's members are unilaterally associated on an undifferentiated basis with *all* candidates who, at their discretion, "prefer" that party.

A hypothetical may help illustrate the situation confronting the political parties and the voters of Washington in an Initiative 872 primary. Let us assume the Republican Party holds its own privately run party convention prior to the modified blanket primary to select the Party's nominee for the primary ballot for a particular state office. *Cf. Jones*, 530 U.S. at 585, 120 S. Ct. 2402 (noting that candidates appearing on a nonpartisan blanket primary ballot may be nominated by established political parties).[17] Let us further assume that two

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[17] In fact, the Washington State Republican and Democratic Parties adopted contingency rules in anticipation of

Republican candidates (both of whom are bona fide party members)-Candidate C, a conservative, and Candidate M, a moderate-compete against one another for the nomination and that Candidate C wins the Republican nomination at the convention. Lastly, let us assume the existence of a third candidate-Candidate W, a wild-eyed radical-who purports to "prefer" the Republican Party but who is not a Party member, whose views are anathema to the Party's membership and who does not participate in the Party's convention process. Despite Candidate C's party nomination, Candidate M and Candidate W decide that they want to appear on the primary ballot.[18] Given these assumptions, how would each of these candidates be designated on the ballot, and

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Initiative 872's enactment whereby those parties would select their nominees for state offices through private nominating conventions conducted before the state-run blanket primary.

[18] It is quite easy to put one's name on the Washington partisan primary ballot with any given political party preference under Initiative 872. All that is required is (1) a declaration of registered voter status in the appropriate jurisdiction (along with an address in that jurisdiction); (2) a declaration of the position the candidate seeks; (3) *a declaration of party preference* or independent status; (4) a filing fee; and (5) a signed declaration that the candidate will support the Constitution and the laws of the United States and Washington State. The emergency regulations promulgated by the Washington Secretary of State in May 2005 confirmed the parties' inability to control who runs using their name: "neither endorsement by a political party nor a nominating convention are [sic] required in order to file a declaration of candidacy and appear on the primary election ballot." Wash. Admin. Code § 434-215-015 (2005).

how would voters be able to distinguish among them?[19]

Presented with this scenario at oral argument, the State of Washington conceded that all three candidates would be designated in an identical fashion on the primary ballot-all would be shown to have "Republican" as their "party preference."[20] This

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[19] The questions posed by this hypothetical illustrate that a number of the arguments advanced by the State of Washington and the political parties need not be settled in order to resolve the central issue on appeal. First, the State of Washington argues that states are not compelled to provide political parties with a publicly financed primary to select party nominees and that by enacting the provisions of Initiative 872, it is "getting out of the 'party nomination' business." However, the inclusion of candidates' party preferences on the primary ballot suggests that Washington has not gotten out of the party nomination business entirely because Initiative 872 permits "spoiler" candidates from the same party and nonparty members to present themselves on an equal footing with party nominees on the ballot.

Second, Washington argues that "the associational rights of political parties do not include the right to have their nominees advance to the general election ballot." But even if we construed the political parties' argument to be that they have a right to have their respective nominees appear on the general election ballot, that argument misses the mark because it only addresses the "top two" nature of the Initiative 872 primary. The concern in this case is not that the top two vote-getters advance from the primary to the general election. Rather, it is that Initiative 872 provides candidates with a designated space on the ballot to express their party preference, notwithstanding the political parties' unwillingness to associate with a particular candidate or nominate that person as a standard bearer.

[20] The text of Initiative 872 does not itself clearly prescribe how the candidates' party preferences are to be worded on the primary ballot, nor do the Washington Secretary

is the essence of Initiative 872's constitutional flaw. Because candidates can freely designate their political party preferences on the primary ballot, but the ballot does not show which candidates are the political parties' official nominees (or even true party members), voters cannot differentiate (1) bona fide party members such as Candidates C and M from outsiders who purportedly prefer the party such as Candidate W; or (2) party nominees such as Candidate C from "spoiler" intraparty challengers such as Candidate M.[21] The net effect is that parties do not choose who associates with them and runs using their name; that choice is left to the candidates and forced upon the parties by the listing of a candidate's name "in conjunction with" that of the party on the primary ballot. Wash. Rev. Code § 29A.04.110 (2004). Such an assertion of association by the candidates against the will of the parties and their membership constitutes a severe burden on political parties' associational rights. *See Tashijan*, 479 U.S. at 215 n.6, 107 S. Ct. 544; *Duke*, 954 F.2d at 1531.

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of State's emergency rules, issued on May 18, 2005, implementing the provisions of Initiative 872. For instance, the ballots could indicate party preference with letters like "D" and "R" or abbreviations like "Dem." and "Rep." following the names of the primary candidates, without stating that they are "preferences" only. For purposes of this appeal, however, we assume that the ballots clearly state that a particular candidate "prefers" a particular party.

[21] The second of these two scenarios of voter confusion would not be present if a party did not nominate a single standard bearer in a private convention prior to the modified blanket primary, but that would not cure the first problem.

In so holding, we do not question a political candidate's fundamental right to express a political viewpoint, including a political preference, more generally. *See, e.g., Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971) ("[I]t can hardly be doubted that the [First Amendment's] constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."). We are not deciding that an expression of a party preference other than as a ballot designation-such as in campaign literature or advertising, a candidate statement in the voters' pamphlet or a news conference-constitutes a forced association between the candidate stating the preference and the political party being preferred. Rather, we are focused on the specific primary election ballot created by Initiative 872, and the one-sided expression of party preferences on that ballot. There is a constitutionally significant distinction between ballots and other vehicles for political expression. "Ballots serve primarily to elect candidates, not as forums for political expression." *Timmons*, 520 U.S. at 363, 117 S. Ct. 1364. Here the ballot communicates a political association that may be unreciprocated and misleading to the voters, to the detriment of the political parties and their bona fide members.

The State of Washington attempts to counter our concern with this one-sidedness by itself invoking *Timmons*. It suggests that the lack of distinction between Candidates C, M and W on the primary ballot could be cured by the more detailed candidate statements that would likely reveal party membership and a candidate's status as a political

party's nominee. Washington also contends that it is permissible to place candidates' party preferences on the ballot without regard to the parties' candidate preferences, because parties have no more right to use the ballot to send a message to voters than other politically minded, nonparty organizations do. *Cf. id.* We address and reject each of these contentions in turn.

Candidate statements cannot cure Initiative 872's one-sided party-preference labeling on the primary ballot. As previously discussed, political parties' names matter; they are shorthand identifiers that voters traditionally rely upon to signal a candidate's substantive and ideological positions. *See Rosen*, 970 F.2d at 172. For some voters, the party label may be enough; other voters may seek out more information about a candidate. As the Supreme Court observed in *Tashijan*, "[t]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." 479 U.S. at 220, 107 S. Ct. 544. When the Libertarian Party challenged Oklahoma's semi-closed primary law by seeking to open the Libertarian Party primary beyond registered Libertarians and independents to *all* voters regardless of affiliation, the Court expressed its concern about the possibility of voters' being misled by party labels: "Opening the [Libertarian Party's] primary to all voters not only would render the [Libertarian Party's] *imprimatur* an unreliable index of its candidate's actual political philosophy, but it

also would make registered party affiliations significantly less meaningful . . . ." *Clingman*, 544 U.S. at 595, 125 S. Ct. 2029 (internal quotation marks omitted).

A party should not be placed in the position of having to overcome a false association between itself and a candidate by relying on the candidate's off-ballot clarifying statements.[22] It is too much to expect candidate statements to clear up the confusion engendered by the primary ballot regarding who is the "real" Republican, Democratic or Libertarian standard bearer for his or her respective party, never mind whom party members would acknowledge as a fellow member.[23]

We are similarly unconvinced by Washington's argument that the political parties' associational

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[22] Although the political parties have not expressed their argument in exactly these terms, we note that the Supreme Court has long recognized that "the choice to speak includes within it the choice of what not to say." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986). When a law "impermissibly requires [someone] to associate with speech with which [he or she] may disagree," that person "may be forced either to appear to agree . . . or to respond." *Id.* at 15, 106 S. Ct. 903. "That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster." *Id.* at 16, 106 S. Ct. 903.

[23] We recognize that party affiliations and political views of candidates in races for high profile state offices, such as governor, will be widely and publicly known, and in such cases, voters may not be relying on the party preference designation on the ballot. However, the same cannot be said for lower profile state offices where the expression of party preference on the ballot may well provide the decisive "voting cue." *Rosen*, 970 F.2d at 172.

rights are not severely burdened because their inability to indicate their candidate preference on the primary ballot is no different from the inability of other, nonparty organizations, such as labor unions or better business bureaus, to indicate their candidate preferences. First, Washington's argument is undermined by the fact that Initiative 872 singles out candidates' political party preferences to be listed on the primary ballot, but not preferences with respect to any other organization. Second, a political party is historically different from other organizations with political interests in that it nominates candidates to run for political office in the party's name.[24] *See Jones*, 530 U.S. at 575-77, 120 S. Ct. 2402; *Kusper v. Pontikes*, 414 U.S. 51, 58, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973) ("Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections."). We therefore reject the premise of an equivalency between political parties and other organizations that lies at the heart of Washington's argument.

In sum, because a party label-even if expressed more ambiguously as a party preference-conveys to voters "a shorthand designation of the views of party candidates on matters of public concern," *Tashijan*, 479 U.S. at 220,

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[24] Like political parties, other organizations with political interests-from the National Rifle Association to the Sierra Club-may endorse candidates for office, but endorsement is not the equivalent of nomination. *Cf. Jones*, 530 U.S. at 580, 120 S. Ct. 2402 ("The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee.").

107 S. Ct. 544, Initiative 872's party "preference" designation allows some candidates to create a mistaken impression of their true relationship with a political party. That severe burden on parties' associational rights is not negated by requiring voters to rely on candidates' or parties' off-ballot statements to clarify the nature or even lack of an actual party association.

2. Compelling state interest and narrow tailoring

Washington and the Grange have focused their arguments on appeal on the contention that Initiative 872 does not severely burden the political parties' associational rights at all. They have not articulated any compelling state interest that justifies such a burden. To the extent that we can read compelling state interests between the lines of their arguments-essentially those interests articulated and found inadequate by the Supreme Court in *Jones*-we conclude that such interests could be sufficiently served by a more narrowly tailored primary system. One obvious approach would be to create a true nonpartisan primary, such as the one discussed in *Jones*, where only a candidate's name without any party preference or designation appears on the ballot. Therefore, we hold that the modified blanket primary enacted by Initiative 872 in November 2004 is unconstitutional.

C. Severing Unconstitutional Provisions

As a fallback position, Washington and the Grange argue that any unconstitutional provisions in Initiative 872-namely those that provide for the designation of candidate party preferences-can be

severed from the rest of the Initiative. Following Washington law, which guides our severability inquiry, *see Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir. 2003) (per curiam), we conclude that it is not possible to sever the constitutionally deficient portions from the rest of Initiative 872.

The Washington Supreme Court has set forth its state severability doctrine as follows:

> [A]n act or statute is not unconstitutional in its entirety unless invalid provisions are unseverable and it cannot reasonably be believed that the legislative body would have passed one without the other, or unless elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes. A severability clause may provide the assurance that the legislative body would have enacted remaining sections even if others are found invalid. It is not necessarily dispositive on that question, though . . . . The independence of the valid from the invalid parts of an act does not depend on their being located in separate sections. The invalid provision must be grammatically, functionally, and volitionally severable.

McGowan v. State, 148 Wash. 2d 278, 60 P.3d 67, 75 (2002) (internal punctuation marks, footnote and citations omitted).[25]

Conceptually speaking, severing all references to party preference from Initiative 872 seems fairly straightforward even though, as a practical matter, a fair number of provisions or portions of provisions would have to be severed.[26] However, even if we assume without deciding that the problematic provisions are "grammatically" or even "functionally" severable,[27] they are not "volitionally" severable. Volitional severability is another way of stating the *McGowan* requirement that "it cannot reasonably be believed" that Washington voters would have passed the remaining portions of Initiative 872 without the excised party preference provisions. *Id.*

Even if we grant Washington and the Grange's argument that Washington voters understood that Initiative 872 redefined candidate partisanship (i.e., as a party preference rather than as a stronger form of party affiliation), excising all mentions of party

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[25] Initiative 872 contains no severability clause, although under *McGowan*, this fact is not dispositive. 60 P.3d at 75.

[26] The district court identified Sections 4, 5, 7(2), 7(3), 9(3), 11 and 12 as provisions of Initiative 872 that were "potentially severable." We need not decide whether or not the district court accurately identified all of the Initiative's provisions that are "potentially severable" because Initiative 872 fails the volitional prong of *McGowan*.

[27] We understand functional severability to be a restatement of the *McGowan* requirement that "elimination of the invalid part would [not] render the remaining part useless to accomplish the legislative purposes." 60 P.3d at 75.

preference from the modified blanket primary would transform a partisan primary into a nonpartisan one. It is not reasonable to believe that Washington voters would have passed Initiative 872 if they knew it would result in nonpartisan primaries for all statewide offices. Because the party preference provisions in Initiative 872 do not pass the volitional severability test in *McGowan*, we conclude that Initiative 872 cannot be saved by severing its provisions for candidate party preferences. We hold that Initiative 872 is unconstitutional in its entirety.[28]

III. CONCLUSION

Although the Constitution grants States "a broad power . . . to regulate the time, place, and manner of elections[, that power] does not justify, without more, the abridgement of fundamental rights, such as . . . the freedom of political association." *Tashijan*, 479 U.S. at 217, 107 S. Ct. 544 (internal citations omitted). A political party's "determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Id.* at 224, 107 S. Ct. 544. Initiative 872 severely burdens the Washington political parties' associational rights by allowing all candidates to state their party preferences on the primary ballot. This one-sided statement of party preferences on the ballot has the potential to force a

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[28] Because we have held Initiative 872 to be unconstitutional under the First and Fourteenth Amendments, we do not reach any of the other arguments that the political parties advance with respect to Initiative 872.

political party into an unwanted association with a candidate who may be anathema to everything the party stands for. We hold that Initiative 872 is unconstitutional in its entirety because the party preference provisions are not severable from the rest of Initiative 872 under Washington law. The judgment of the district court is affirmed.

AFFIRMED.

United States District Court, W.D. Washington.

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

and Washington State Democratic Central Committee, et al.,

Plaintiff Intervenors,

and Libertarian Party of Washington State, et al.,

Plaintiff Intervenors,

v.

Dean LOGAN, King County Records & Elections Division Manager, et al., Defendants,

State of Washington,

Defendant Intervenors,

and Washington State Grange,

Defendant Intervenors.

No. C 05-927Z.

July 15, 2005.

Background: Major political parties sued State of Washington, seeking determination that initiative governing primary elections violated their First Amendment rights. Parties moved and cross moved for summary judgment.

Holdings: The District Court, Zilly, J., held that:

(1) initiative involved nomination of candidates, which was fundamental associational right of political parties protected by First Amendment;

(2) associational rights of parties was violated when initiative provided that voters of any or no political party could vote in primary for any candidate running for particular office, regardless of party preference indicated by candidate;

(3) associational rights were also violated through provision allowing for candidates to self identify themselves as preferring particular party, regardless of whether party approved of candidate;

(4) provisions of state statutes governing ballot placement of minority parties were preempted, precluding argument by major parties that initiative violated their equal protection rights by allowing minority party statutory procedure from which they were now excluded; and

(5) constitutional provisions could not be separated from unconstitutional provisions.

Judgment for political parties.

John James White, Jr., Kevin B. Hansen, Livengood, Carter, Tjossem, Fitzgerald & Alskog, Kirkland, WA, David Thomas McDonald, Jay S Carlson, Preston Gates & Ellis, Seattle, WA, Richard Dale Shepard, Shepard Law Office Inc., Tacoma, WA, for Plaintiff.

Janine Joly, Thomas William Kuffel, King County Courthouse Civil Division, Seattle, WA, Thomas Fitzgerald Ahearne, Foster Pepper & Shefelman,

Seattle, WA, Gordon W. Sivley, Robert Tad Seder, Snohomish County Prosecuting Attorney Civil Division, Everett, WA, Steven James Kinn, Spokane County Prosecutor's Office, Spokane, WA, Curtis Guy Wyrick, Clark County Prosecuting Attorney's Office, Vancouver, WA, Ronald S. Marshall, Cowlitz County Prosecutor's Office, Kelso, WA, James Garnet Baker, Grays Harbor Prosecuting Attorney's Office, Montesano, WA, Frederick Alan Johnson, Wahkiakum County Prosecuting Attorney, Cathlamet, WA, David W. Alvarez, Jefferson County Prosecuting Attorney's Office, Port Townsend, WA, for Defendants.

James Kendrick Pharris, Jeffrey T. Even, Maureen Alice Hart, Attorney General of Washington, Olympia, WA, for Defendant Intervenors.

ORDER

ZILLY, District Judge.

IV. INTRODUCTION

On May 19, 2005, the Washington State Republican Party (the "Republican Party") filed this action against Dean Logan, King County Records and Elections Division Manager and the Auditors of eight other counties. Complaint, docket no. 1. The Republican Party's Complaint challenges Initiative 872 on the basis of the First and Fourteenth Amendments to the United States Constitution. The Washington State Democratic Central Committee (the "Democratic Party") and the Washington State Libertarian Party (the "Libertarian Party") have now

intervened as Plaintiffs and also contend that Initiative 872 is unconstitutional. *See* docket nos. 2, 3.

Plaintiff Republican Party contends that Initiative 872 is unconstitutional because the Initiative prevents voters who share party affiliation from selecting their party's nominees. The Republican Party also alleges that Initiative 872 forces the Party to be associated publicly with candidates who have not been nominated by the Party, who will alter the political message and agenda the Party seeks to advance, and who will confuse the voting public with respect to what the Party and its adherents stand for.

The Democratic Party contends portions of Initiative 872 are unconstitutional to the extent that they authorize the County Auditors to permit non-affiliates of the Democratic Party to participate in its nomination process, and to the extent Initiative 872 allows crossover voting in violation of the Party's associational rights.

The Libertarian Party claims that Initiative 872 is unconstitutional because it "places impermissible limits on access to the general election ballot" contrary to the United States Constitution, and allows a person to appropriate the Libertarian Party label without compliance with its nominating rules and without allowing the Party to define what the Party label means.

The State of Washington and the Washington State Grange (the "Grange") have also intervened as Defendants. *See* Order, docket no. 30; *see also* Minute Entry, docket no. 45. The State of

Washington and the Grange contend that Initiative 872 is constitutional.

This case presents a classic conflict between the rights of the voters to establish by initiative a new system for conducting primaries and general elections for partisan offices, and the rights of political parties to control the nomination of partisan candidates for elective office and to protect their rights of association. Primaries constitute a "crucial juncture" in the elective process and a "vital forum" for expressive association among voters and political parties. *Clingman v. Beaver*, --- U.S. ---, 125 S. Ct. 2029, 2042, 161 L. Ed. 2d 920 (2005) (O'Connor, J., concurring). The voters by Initiative 872 seek to create a system "that best protects the rights of voters to make such choices, increases voter participation, and advances compelling interests of the state of Washington." Initiative 872, Sec. 2.[1]

Plaintiffs seek to have Initiative 872 declared unconstitutional under the United States Constitution as constituting an illegal nomination process, as requiring an unconstitutional "forced association," and for violating equal protection under the law. The recent invalidation of the Washington blanket primary forced Washington voters to choose between two strikingly different versions of a primary election. The voters were forced to choose between voter choice and party nominations, and the voters chose voter choice.

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[1] The Text of Initiative 872 can be found at Wash. Rev. Code. Ann. § 29A.52 (West Supp. 2005). Throughout this Order, the Court will cite to the text of Initiative 872 as "Initiative 872, Sec. __".

In considering the issues presented in this case, the Court does not begin with a clean slate. Rather, the United States Constitution and binding court precedent have created the landscape for deciding these important issues.

V. HISTORY OF WASHINGTON'S PRIMARY PROCESS

For over 100 years, Washington has had a partisan election system. Historically, voters at the general election were provided a choice between representatives of each qualifying political party. From 1890 through 1907, candidates for partisan offices were chosen either by convention or by petition. In 1907, the Washington State Legislature established the first direct primary system for partisan candidates, requiring political parties to choose their representative through a public primary. *See State ex rel. Wells v. Dykeman*, 70 Wash. 599, 127 P. 218 (1912). In this system separate ballots were printed for each political party and voters could only cast ballots in one party's primary.

Washington State's "blanket primary"[2] system

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[2] In a "closed" primary, only voters who register as members of a party may vote in primaries to select that party's candidates. In an "open" primary, the voter can choose the ballot of any party but then is limited to the candidates on that party's ballot. In a "blanket primary," a voter can vote for candidates of any party on the same ballot. In a "nonpartisan blanket primary," voters can vote for anyone on the primary ballot, and the top vote-getters, regardless of party, run against each other in the general election. *See Democratic Party of Wash. v. Reed*, 343 F.3d 1198, 1203 (9th Cir. 2003).

was first established in 1935. Except for presidential primaries,[3] all properly registered voters could vote

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Currently, thirty seven states conduct some type of closed primary. Ala. Code § 17-16-14(b); Alaska Stat. § 15.25.010; Ariz. Rev. Stat. § 16-467; Ark. Code Ann. §§ 7-7-307, 7-7-308; Cal. Elec. Code § 2151; Colo. Rev. Stat. §§ 1-7-201, 1-2-218.5; Conn. Gen. Stat. § 9-431; Del. Code Ann. tit. 15, § 3161; Fla. Stat. Ann. § 101.021; 10 Ill. Comp. Stat. 5/7-43(a); Ind. Code § 3-10-1-6; Iowa Code Ann. §§ 43.41, 43.42; Kan. Stat. Ann. § 25-3301; Ky. Rev. Stat. Ann. § 116.055; Me. Rev. Stat. Ann. tit. 21-A, § 340; Md. Code Ann., Election Law, § 8-802; Mass. Gen. Laws Ann. ch. 53 § 37; Miss. Code Ann. § 23-15-575; Neb. Rev. Stat. § 32-912; Nev. Rev. Stat. 293.287; N.H. Rev. Stat. Ann § 654.34(II); N.J. Stat. Ann. § 19:23-45.1; N.M. Stat. Ann. § 1-12-7; N.Y. Elec. Laws § 1-104(9); N.C. Gen. Stat. § 163-59; Ohio Rev. Code Ann. § 3513.19; Okla. Stat. tit. 26, § 1-104; Or. Rev. Stat. § 254.365; 25 Pa. Cons. Stat. Ann. § 2832; R.I. Gen. Laws §§ 17-15-21, 17-15-24, 17-9.1-23; S.C. Code Ann. § 7-9-20; S.D. Codified Laws § 12-6-26; Tenn. Code Ann. § 2-7-115; Tex. Elec. Code Ann. §§ 162.003, 162.012, 162.013; Utah Code Ann. §§ 20A-3-104.5, 20A-3-202; W. Va. Code § 3-1-35; Wyo. Stat. Ann. § 22-5-212.

Eleven states conduct open primaries. Ga. Code Ann. § 21-2-224; Haw. Rev. Stat. § 12-31; Idaho Code §§ 34-402, 34-404, 34-904; Mich. Comp. Laws § 168.576; Minn. Stat. § 204D.08; Mo. Rev. Stat. § 115.397; Mont. Code Ann. § 13-10-301; N.D. Cent. Code § 16.1-11-22; Vt. Stat. Ann. tit. 17, § 2363; Va. Code Ann. § 24.2-530; Wis. Stat. §§ 5.37, 6.80.

Two states conduct so-called nonpartisan blanket primaries. Louisiana is the only state other than Washington to conduct such a primary. La. Rev. Stat. Ann. §§ 18:401, 18:481, 18:482.

All states but Louisiana and Washington limit voters to voting in only one political party's primary.

[3] None of the primary systems addressed in this Order affect Presidential and Vice Presidential primaries. These primaries are addressed by a separate system found in Wash. Rev. Code § 29A.56.010, *et seq.*

for their choice at any primary for "any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter." Wash. Rev. Code Ann. § 29.18.200 (West 2003). As a result, each voter received a ballot listing all candidates of all parties and could vote for any candidate as opposed to getting an exclusively Republican, Democratic, or other party ballot. Under the blanket primary system, voters could choose candidates from some parties for some positions, others for other positions, and engage in cross-over voting or "ticket splitting." Wash. Rev. Code Ann. § 29.18.200 (2003). Under the blanket primary system, minor parties selected their nominees at conventions prior to the date of the primary. Wash. Rev. Code Ann. § 29.24.020 (2003). These nominees would be placed on the ballot for the primary election. To be placed on the general election ballot, under the prior blanket primary procedure, minor party nominees had to receive a number of votes equal to at least one percent of the total number cast for all candidates for that position. Wash. Rev. Code Ann. § 29.30.095 (2003).[4]

In 2000, the United States Supreme Court held that California's blanket primary, similar in many respects to Washington's blanket primary, was

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[4] A " 'major political party' [is] a political party of which at least one nominee for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year." Wash. Rev. Code § 29A.04.086. A minor political party is "a political organization other than a major political party." Wash. Rev. Code § 29A.04.097.

unconstitutional. *California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000). The Supreme Court held that the California blanket primary placed a severe burden on political parties' right of association, was not narrowly tailored to achieve a compelling state interest, and was therefore unconstitutional. *Id.* at 582-85, 120 S. Ct. 2402.

In 2003, relying on *Jones*, the Ninth Circuit Court of Appeals held that Washington's blanket primary system was unconstitutional in *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213, 124 S. Ct. 1412, 158 L. Ed. 2d 140 (2004). The Ninth Circuit stated that Washington's primary system was "materially indistinguishable" from the invalidated California system. *Id.* at 1203. As a result, Washington's blanket primary that had been used for over sixty-five years was held unconstitutional and the State was legally enjoined from "conducting the challenged primary in future elections." Amended Judgment, *Washington State Democratic Party v. Reed*, No. C00-5419FDB (W.D. Wash. May 13, 2004).

On January 8, 2004, the Grange filed Initiative 872 with the Secretary of State (the "Secretary").[5] Dembowski Decl., docket nos. 68 and

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[5] The Washington Constitution was amended in 1912 to allow direct government by the people in the form of popularly enacted initiatives and referendums on laws passed by the Legislature. Wash. Const. art. II, § 1 ("the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law

69, Ex. F. Initiative 872 proposed a "top two" primary system in which a properly registered voter has "the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation of either the voter or the candidate." Initiative 872, Sec. 5.[6] Initiative 872 defines a partisan primary as a "procedure for winnowing candidates for public office to a final list of two as part of a special or general election." *Id.*

While sponsors of Initiative 872 were gathering signatures,[7] the Washington State Legislature was faced with the task of developing a new primary system in Washington State after the

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passed by the legislature"). The initiative process allows the electorate to petition to place proposed legislation on the ballot. If the initiative's supporters timely file a petition with signatures of legal voters equaling eight percent of the votes cast for the office of governor at the last regular gubernatorial election, the proposed legislation is placed on the ballot. Wash. Rev. Code §§ 29A.72.150, 29A.72.250. Voters are then able to directly vote on the proposed legislation at the next general election or special election called by the Legislature. Since the State adopted the initiative process in 1912, voters have approved sixty-one statewide initiatives.

[6] The primary system proposed by Initiative 872 has been referred to as the "modified blanket primary," the "People's Choice Initiative," and the "top two" primary. For purposes of this Order the Court will refer to the primary system under attack in this litigation as simply Initiative 872.

[7] To begin the process of placing a proposed initiative on the ballot, a legal voter must file with the Secretary a legible copy of the proposed measure accompanied by an affidavit that the proposer is a legal voter and the requisite filing fee. Wash Rev. Code § 29A.72.010. This filing must be made within ten months of the date of the election at which the measure is to be submitted to a vote. Wash. Rev. Code § 29A.72.030.

Reed decision invalidated the blanket primary. On March 10, 2004, the Legislature enacted a bill which would have provided for two alternative primary systems. E.S.B. 6453, 58th Leg., 2004 Reg. Sess. (Wash. 2004). Part I of the bill provided for a "Louisiana" style primary system, commonly referred to as the "top two" approach. *See id.*, Part I. Under the top two approach, a registered voter would be permitted to cast a vote for each office appearing on the ballot without any limitation based on the party preference of either the voter or the candidate. *Id.*, § 5. The top two candidates would then proceed to the general election.[8]

Aware that the political parties would probably challenge the constitutionality of the top two system, the Legislature also enacted a "backup plan" to take effect if the top two system was invalidated. *Id.*, Part II. Under this alternative, also referred to as the "Montana system," candidates qualify for the general election through a process in which voters are not required to register with a party, but choose among candidates of a single party. Their choice of the ballot selected is not public. Under this backup plan, major political party candidates for partisan offices would be nominated by way of a primary election in which a voter would have to choose a political party's ballot and could only vote for candidates on that party's ballot. *Id.*,

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[8] The top two system passed by the Legislature is similar, although not identical, to the primary system proposed in Initiative 872.

§ 126.[9] Under the Montana system, minor party candidates would be nominated by a party nominating convention, Wash. Rev. Code § 29A.20.121(1), and the minor party candidate selected would be placed on the ballot for the general election. Wash. Rev. Code §§ 29A.20.121; 29A.20.141. Minor party candidates will appear only on the general election ballot under the Montana system.

On April 1, 2004, Governor Gary Locke vetoed the top two approach. E.S.B. 6453, 58th Leg., 2004 Reg. Sess. (Wash. 2004) (Governor's Veto Message). As a result, the Montana primary system took effect and was used by Washington voters in the primary election in the fall of 2004.

On November 2, 2004, Initiative 872 was approved by the voters by almost 60 percent. Dembowksi Decl., docket nos. 68 and 69, Ex. J (Washington State Election Measures Results). Initiative 872 became effective on December 2, 2004, thirty days after it was approved in the 2004 general election. Wash. Const. art. II, § 1.[10]

Initiative 872 provides the process for the selection of candidates for partisan office in Washington. A "major political party" means a

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[9] Under the categories of primary the Court has identified, the Montana primary system can be categorized as an open primary.

[10] Initiative 872 also does not amend the statutes governing how the special primary for the office of U.S. President will be conducted. The Presidential election process, involving nominations by the national parties, is not subject to state-by-state regulation.

political party of which at least one nominee for President, Vice President, United States Senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even numbered year. Wash. Rev. Code § 29A.04.086. A "minor political party" is any political organization other than a major political party. Wash. Rev. Code § 29A.04.097.

Initiative 872 did not explicitly amend or repeal any sections of the Revised Code of Washington regulating the nomination of minor party candidates. Initiative 872, Sec. 17; Wash. Rev. Code §§ 29A.20.110-29A.20.201. The party nominating procedures established by the Montana primary system were not in existence at the time Initiative 872 was filed, making it impossible for the Initiative to have repealed or otherwise addressed these procedures. In addition, Initiative 872 did not refer to, repeal, or amend related sections of the Revised Code of Washington in existence at the time of the filing of the Initiative in January 2004. These provisions, which were part of the blanket primary, *see* Wash. Rev. Code Ann. §§ 29.24.020, 29.30.005, 29.30.095 (West 2003), provided in substance that minor party candidates would be nominated at party conventions. If a minor party candidate received one percent of the vote in the primary, that candidate would appear on the general election ballot.[11]

In the 2005 legislative session, the Secretary sponsored legislation in both the State House and

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[11] The *Reed* court decision did not address the provisions relating to minor party candidates.

the Senate to "implement" Initiative 872. *See* H.B. 1750, 59th Leg., 2005 Reg. Sess. (Wash.2005); S.B. 5745, 59th Leg., 2005 Reg. Sess. (Wash. 2005). These bills would have eliminated minor party nominating conventions, other than for President and Vice President. H.B. 1750, Sec. 9. The Legislature did not enact any legislation dealing with Initiative 872 in 2005.[12]

On May 18, 2005, the Secretary adopted emergency regulations relating to primary elections in Washington. One of these regulations, Wash. Admin. Code § 434-215-015, purports to abolish the minor party convention rights that were not addressed in the text of Initiative 872 or by the Washington Legislature during 2004. Pharris Decl., docket no. 66, Ex. C (New Section: WAC 434-215-015).

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[12] E-mail correspondence from individuals within the state government indicates that at least some believed any changes made to Initiative 872 would have to be made by a two-thirds majority vote of the Legislature. Hansen Decl., docket no. 64, Ex. 3 at 22-23 (E-mail from Rep. Kathy Haigh to Bob Terwilliger). Another internal e-mail indicates that some state legislators believed that any legislation that would change the minor party nominating procedure would also have to pass by a two-thirds majority. *Id.* at 26 (E-mail from John Pearson to Katie Blinn). Article II, Section 41, of the Washington State Constitution provides that no act, law or bill enacted by a majority of voters can be amended or repealed within two years of its enactment except by a two-thirds vote of the Legislature. Wash. Const. art. II, § 41.

VI. ISSUES PRESENTED AND RELIEF REQUESTED

Pursuant to the Court's request, the parties have stipulated that the following legal issues should be addressed at this time.

1. Does the primary system established by Initiative 872 nominate political party candidates for public office?

2. If the primary system under Initiative 872 does not nominate political party candidates for public office, does each political party have the right to select for itself the only candidate who will be associated with it on either a primary or general election ballot?

3. If the primary system under Initiative 872 nominates political party candidates for public office, does Initiative 872 violate the First Amendment by compelling a political party to associate with unaffiliated voters and members of other political parties in the selection of its nominees?

4. Does Washington's filing statute impose forced association of political parties with candidates in violation of the parties' First Amendment associational rights?

5. Does Initiative 872's limitation of access to the general election ballot to only the top two vote-getters in the primary for partisan office unconstitutionally limit ballot access for minor political parties?

See Stipulated Statement of Legal Issues, docket no. 40. In addition, the parties have briefed the issue of whether Initiative 872 is severable if the Court finds portions of the Initiative unconstitutional. Plaintiffs Republican Party, Democratic Party and Libertarian Party move the Court for Summary Judgment in their facial challenge to Initiative 872.

Plaintiff Republican Party asks the Court for a ruling as a matter of law that Initiative 872 and Washington's filing statutes, Wash. Rev. Code §§ 29A.24.030, 29A.24.031, impose an unconstitutional burden on First Amendment rights. Plaintiff moves for a permanent injunction preventing any partisan election pursuant to Initiative 872, or the identification of any candidate as "Republican," if not authorized by the Republican Party.

Plaintiff Democratic Party asks the Court for a ruling as a matter of law that Initiative 872 burdens First Amendment rights by (1) allowing any candidate, regardless of their party affiliation or relationship to the party, to self-identify as a member of a political party and to appear on the primary and general election ballots as a candidate for that party; and (2) allowing any voter, regardless of party affiliation, to vote for any political party candidate in the primary election. Plaintiff moves for a permanent injunction preventing the State of Washington or any political subdivision of the State from enforcing or implementing Initiative 872 at any primary or general election.

Plaintiff Libertarian Party asks the Court for a ruling as a matter of law that Initiative 872 and Washington's filing statutes, Wash. Rev. Code §§ 29A.24.030, 29A.24.031, impose an unconstitutional burden on First Amendment rights and unconstitutionally limit minor party ballot access. Plaintiff moves for a permanent injunction preventing a partisan election under Initiative 872; the identification as "Libertarian" of any unauthorized candidate; and any election which requires more than a "modicum of support" to secure general election ballot access.

The State of Washington and the Grange oppose Plaintiffs' Motions for Summary Judgment and the relief requested by the Plaintiffs. The Defendants contend Initiative 872 does not impose a burden on First Amendment associational rights, and request the Court enter an Order and Judgment in their favor.

VII. SUPPLEMENTAL REQUEST

In addition to the issues addressed in opening briefs, the Republican Party submitted a Supplement to its Motion for Summary Judgment, docket no. 63. In the Supplement, the Republican Party requests a finding that Initiative 872 is unconstitutional because it violates the right to equal protection under the law, in violation of the United States Constitution. The Republican Party contends that "Initiative 872 violates the Equal Protection clause by allowing minor political parties to nominate candidates and control their message, but denying the same right to the [major political parties.]" *See* Republican Supplement, docket no. 63, at 4.

The Republican Party's Supplement was filed on June 23, 2005, after the deadline for Opening Briefs. The State of Washington has moved to strike the Republican Party's Supplement, *see* Motion to Strike, docket no. 65, and argues the Supplemental filing is untimely and prejudicial. *Id.* at 10. The Republican Party argues that the Court should consider its additional argument and notes that its equal protection argument was raised in its Complaint, docket no. 1, at ¶¶ 22-23, and previous Motion for Preliminary Injunction, docket no. 7, at 10.

The Court finds that the Republican's Supplement to Summary Judgment Motion, docket no. 63, provided adequate notice to the Defendant State of Washington and the Defendant Washington State Grange. The Supplement raises important issues of equal protection related to the treatment of minor parties under Initiative 872.

The Court DENIES the Motion to Strike, docket no. 65.

VIII. LEGAL STANDARD

This is a facial challenge to Initiative 872, which Plaintiffs allege burdens the exercise of their First Amendment rights. All parties agree that this facial challenge is ripe for adjudication,[13] and that

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[13] A statute may be challenged in two distinct ways. First, a statute may be challenged on its face, whereby a court examines solely the text of the document to determine its constitutionality. Second, a statute may be challenged as it is applied. In an "as applied" challenge, a court considers the constitutionality of a statute as it has been applied to the parties to the action. The Court has previously directed the

the alleged "threat" to the political parties' associational rights is more than hypothetical. The allegation of imminent injury to established First Amendment rights warrants intervention by the federal courts. *See Buckley v. Valeo*, 424 U.S. 1, 117, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

Our constitutional system does not authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative or initiative policy decisions. *See Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). Rather, courts must give state statutes and lawfully enacted initiatives a strong presumption of validity. *See Broadrick v. Oklahoma*, 413 U.S. 601, 611-13, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). The presumption of validity is especially strong in this case because Plaintiffs are making a facial challenge to Initiative 872. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

In a facial challenge, there is no analytic scheme whereby the political parties must submit evidence establishing that they have been harmed. *See Reed*, 343 F.3d at 1203. Rather, the Court evaluates the challenged statute on its face, in light of the constitutional burdens or infringements alleged. *Id.* Plaintiffs in this case allege that Initiative 872 burdens their First Amendment associational rights by allowing non-affiliates of the party to participate in a party's nominee selection

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parties to limit their briefs to Plaintiffs' facial challenge of Initiative 872. The Court reserved issues related to Plaintiffs' as applied challenge.

process and forcing a party to associate with a candidate other than those selected by the party.

Where a statutory scheme imposes a severe burden on core First Amendment rights, the scheme must be found unconstitutional unless the State affirmatively demonstrates that the scheme is narrowly tailored to advance a compelling state interest.[14] *Reed*, 343 F.3d at 1204. In *Reed*, the Ninth Circuit discussed the applicable framework for this Court's review:

> This is a facial challenge to a statute burdening the exercise of a First Amendment right . . . . In *Jones*, the Court read the state blanket primary statutes, determined that on their face they restrict free association, accordingly subjected them to strict scrutiny, and only then looked at the evidence to determine whether the State satisfied its burden of showing narrow tailoring toward a compelling state interest.

343 F.3d at 1203. A "[c]onstitutional challenge to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that

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[14] The State and the Grange argue that a facial challenge requires the challenger to establish "that no set of circumstances exists under which the Act would be valid." *E.g.*, State Response, docket no. 65, at 4 (citing *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)). Because Plaintiffs challenge to Initiative 872 raises First Amendment rights, the Court will subject any restrictions on free association to strict scrutiny. *Reed*, 343 F.3d at 1203.

will separate valid from invalid restrictions." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213-14, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) (internal citations and quotations omitted)).

> Instead, a court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Tashjian, 479 U.S. at 214, 107 S. Ct. 544 (quoting *Anderson*, 460 U.S. at 789, 103 S. Ct. 1564).

The nature of the asserted First Amendment interest in this case is evident: "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Tashjian*, 479 U.S. at 214, 107 S. Ct. 544 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958)). The freedom to join together in furtherance of common

political beliefs "necessarily presupposes the freedom to identify the people who constitute the association." *Tashjian*, 479 U.S. at 214-15, 107 S. Ct. 544. "[A] corollary of the right to associate is the right *not* to associate." *Jones*, 530 U.S. at 574, 120 S. Ct. 2402 (emphasis added).

A. California Democratic Party v. Jones

Prior to 1996, political party nominees in California were determined in a "closed" partisan primary, in which only persons who were members of the political party (i.e., who had declared affiliation with that party when they registered to vote) could vote for the party's nominee. *See* Cal. Elec. Code Ann. § 2151 (West 1996). In 1996, California voters adopted Proposition 198, which changed the California partisan primary from a closed primary to a blanket primary. Under Proposition 198, "all persons entitled to vote, including those not affiliated with any political party," had the right to vote "for any candidate regardless of the candidate's political affiliation." Cal. Elec. Code Ann. § 2001 (West Supp. 2000). The candidate of each party winning the greatest number of votes became "the nominee of that party at the ensuing general election." Cal. Elec. Code Ann. § 15451 (West 1996). California law expressly provided that the name of the candidate of each party with the most votes was the party's "nominee." *Id.* Proposition 198 was promoted as a measure that would "weaken" party "hard-liners" and ease the way for "moderate problem-solvers." *See Jones*, 530 U.S. at 570,

120 S. Ct. 2402. Four political parties brought suit in California alleging the blanket primary adopted by Proposition 198 violated their First Amendment rights of association.

The United States Supreme Court in *Jones* recognized the "major role [the States have] to play in structuring and monitoring the election process, including primaries," and the State's ability to "require parties to use the primary format for selecting their nominees." *Jones*, 530 U.S. at 572, 120 S. Ct. 2402. Nevertheless, the Court held the California blanket primary unconstitutional. The Supreme Court held that "when States regulate parties' internal processes, they must act within the limits imposed by the Constitution." *Jones*, 530 U.S. at 573, 120 S. Ct. 2402.

> Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself. Consistent with this tradition, the Court has recognized that the First Amendment protects the freedom to join together in furtherance of common political beliefs, which necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.

Id. at 574, 120 S. Ct. 2402. The *Jones* Court held that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee," *id.* at 575, 120 S. Ct. 2402, and concluded that the ability of a political party to select its "own candidate," or "nominee," unquestionably implicates associational freedom. *See id.* at 575-76, 120 S. Ct. 2402. Proposition 198, by allowing all voters to vote for any candidate regardless of political affiliation, violated the First Amendment associational rights of the political parties, and forced "political parties to associate with-to have their nominees, and hence their positions, determined by-those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." *Id.* at 577, 120 S. Ct. 2402.

B. Democratic Party v. Reed

Washington State's blanket primary differed from California's blanket primary in that it did not explicitly name the candidate of each party with the most votes as its "nominee." *Compare* Cal. Elec. Code Ann. § 15451. Under Washington's blanket primary, "all properly registered voters" could vote at any primary "for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter." Wash. Rev. Code Ann. § 29.18.200 (West 2003). To reach the general election ballot, a candidate had to receive a plurality of the votes cast for candidates of his or her party, and at least one percent of the total votes cast at the primary for all candidates for that office. Wash. Rev. Code Ann. § 29.30.095 (West 2003).

Because all candidates from all parties were listed on the primary ballot, and were voted on by all registered voters, the Ninth Circuit concluded that Washington's blanket primary was "materially indistinguishable" from California's blanket primary. *Reed*, 343 F.3d at 1203. The Ninth Circuit held that Washington's blanket primary was "on its face an unconstitutional burden on the rights of free association" of the political parties. *Id.* at 1207.

The State of Washington argued in *Reed* that Washington's blanket primary was distinguishable from California's blanket primary because Washington does not register voters by party, and because winners of the primary are " 'nominees' not of the parties but of the electorate." *Id.* at 1203. As such, the State argued Washington's primary was a *nonpartisan* blanket primary. *Id.* The Ninth Circuit disagreed, concluding that Washington's blanket primary denied "party adherents the opportunity to nominate their party's candidate free of the risk of being swamped by voters whose preference is for the other party." *Id.* at 1204.

> The right of people adhering to a political party to freely associate is not limited to getting together for cocktails and canapés. Party adherents are entitled to associate to choose their party's nominees for public office. * * * Put simply, the blanket primary prevents a party from picking its nominees.

Id. The Ninth Circuit concluded that the First Amendment's protection of freedom of association

required invalidation of Washington's blanket primary. *Id.* As a result, Washington's blanket primary was held unconstitutional and the State was enjoined from using the blanket primary system in the future.

IX. ANALYSIS OF INITIATIVE 872

A. Does the primary system established by Initiative 872 nominate political party candidates for public office?

The parties dispute whether the primary system under Initiative 872 "nominates" political party candidates for public office, and whether it violates the First Amendment associational rights of the political parties. This inquiry is important because under *Jones*, primary voters at large may not choose a party's nominee. 530 U.S. at 585-86, 120 S. Ct. 2402.

The 2004 Voters' Pamphlet description of Initiative 872 stated:

> Initiative Measure No. 872 concerns elections to partisan offices.
>
> This measure would allow voters to select among all candidates in a primary. Ballots would indicate candidates' party preference. The two candidates receiving most votes advance to the general election regardless of party.

Pharris Decl., docket no. 66, Ex. A (2004 Voters' Pamphlet at 10).

1. Statutory Modifications

Initiative 872 added a new definition for "Partisan office" in Wash. Rev. Code § 29A.04, and modified the definition of "Primary" in Wash. Rev. Code § 29A.04.127, as follows:

> **Sec. 4.** A new section is added to chapter 29A.04 RCW to read as follows:
>
> "Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name. The following are partisan offices:
>
> (1) United States senator and United States representative;
>
> (2) All state offices, including legislative, except (a) judicial offices and (b) the office of superintendent of public instruction;
>
> (3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise.
>
> **Sec. 5.** RCW 29A.04.127 and 2003 c 111 s 122 are each amended to read as follows:
>
> "Primary" or "primary election" means a ((~~statutory~~)) procedure for ((~~nominating~~)) *winnowing* candidates

> ((~~to~~)) *for* public office ((~~at the polls~~)) *to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.*

See Initiative 872, Secs. 4-5. The State and County Auditors recognize no nomination process for a major party other than by the primary. White Decl., docket no. 8, Ex. 8 (County Auditors "not aware of any language associated with the Initiative that contemplates a partisan nominating process separate from the primary."). Under Initiative 872, the only way for a partisan candidate to reach the general election is through the "top two" primary.

The Grange alleges that the Initiative 872 primary "determines the two candidates or *nominees* for the general election ballot, while allowing each candidate to disclose to the voters his or her own political preference." *See* Answer, docket no. 37, at 16 (emphasis added). Nevertheless, the Grange contends that determining the "candidates or nominees" for the general election does not select the candidate or nominee for any political party. *Id.*

The State of Washington argues that Initiative 872 does not "nominate" political party candidates for public office, and does not create a nominating primary. Rather, the State contends that Initiative 872 makes "party nominations . . . irrelevant to qualifying candidates to the ballot." *See* State Response, docket no. 65, at 12. The State urges that unlike a "nominating" primary, Initiative 872 is a

"winnowing" primary in which the primary voters do not choose the party's nominee. Changes by the Initiative to Wash. Rev. Code § 29A.04.127 revised "nominating" to "winnowing."[15] The Republican Party argues that calling the primary a "winnowing primary," rather than a "nominating primary," does not distinguish the Initiative 872 primary system from the blanket primaries rejected in *Jones* and *Reed*, and does not change the fact that Initiative 872's primary nominates candidates. All Plaintiffs argue that the Court must analyze the framework of the Initiative, rather than changes to statutory wording, in determining its effect and possible burden on First Amendment rights.

The Republican Party notes that the State unsuccessfully proffered its "winnowing" arguments

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[15] However, similar changes were not made to other statutes which require the major parties to advance candidates for Congressional, State and County offices by means of these partisan nominating primaries: "[m]ajor political party candidates for all partisan elected offices, except for president and vice president . . . must be nominated at primaries held under this chapter." Wash. Rev. Code § 29A.52.116; *see also* Wash. Rev. Code § 29A.52.111. The State of Washington argues that Wash. Rev. Code § 29A.52.116 is "clearly inconsistent with the system established under I-872, and should be regarded as obsolete." *See* State Response, docket no. 65, at 19 n.16. This provision could not have been expressly repealed by Initiative 872 because it was enacted *after* the filing of Initiative 872. Plaintiffs rely on Wash. Rev. Code § 29A.52.116 as support for their argument that Initiative 872 is a "nominating" primary. This argument is unpersuasive because that statute had not even been enacted when the Initiative was filed. However, for the reasons stated in this opinion the Court concludes that Wash. Rev. Code § 29A.52.116 is not in conflict with the Initiative.

in *Jones*[16] All Plaintiffs suggest the change of "nominating" to "winnowing" is a change without a difference. The Democratic Party argues that Initiative 872 engages in "word-play," attempting to transform the constitutionality of Washington's nominating procedure by avoiding the word "nominate." *See* Democratic Party Opening Br., docket no. 55, at 15.[17] The Democratic Party argues that "tinker[ing] with the wording of the definition of 'primary' to avoid using the word 'nominating' " does not alter the substance of the primary as a nominating procedure. *Id.*

All Plaintiffs urge the Court to conclude that the primary under Initiative 872 is a "nominating" primary, because it results in the selection of political party nominees, and because the State and County Auditors, acting pursuant to state law, permit no nomination process other than by the primary.

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[16] In its amicus curiae brief before the Supreme Court in *Jones*, the State described "the winnowing of candidates for the general election" as the only "aspect of party associational activities affected by the blanket primary." Brief of the States of Washington & Alaska as Amici Curiae in Support of Respondents, 2000 WL 340240 at *10.

[17] "Nominate" means "[t]o propose by name as a candidate, especially for election." The American Heritage Dictionary of the English Language (4th ed.2000). "Winnow" means "[t]o rid of undesirable parts," or "[t]o separate the good from the bad." *Id.*

2. Political Party Function

"[A] basic function of a political party is to select the candidates for public office to be offered to the voters at general elections." *Clingman*, 125 S. Ct. at 2042 (O'Connor, J., concurring) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973)). Political parties are entitled to First Amendment protections for any process which chooses the party's nominee. *See Jones*, 530 U.S. at 575, 120 S. Ct. 2402. The party's "nominee" has also been referred to as the political party's "own candidate," *id.* (quoting *Tashjian*, 479 U.S. at 235-36, 107 S. Ct. 544 (Scalia, J., dissenting)), "standard bearer," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997), "choice," *id.* at 372, 117 S. Ct. 1364 (Stevens, J., dissenting), "ambassador to the general electorate," *Jones*, 530 U.S. at 575, 120 S. Ct. 2402, and the "standard bearer who best represents the party's ideologies and preferences." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989) (internal quotations omitted).

The State contends that by Initiative 872, the State completely decoupled the process for deciding which candidates appear on the general election ballot from any party's nominating process. *See* State Response, docket no. 65, at 17. The State argues that the political parties remain free to select their own nominees, and to advocate on their behalf in the "qualifying" primary. *See id.* Alternatively stated, the State argues that when forced to choose between (1) preserving voter choice; and (2) using primaries to nominate party candidates, voters

chose to preserve voter choice. However, this misapprehends the choice available to voters after *Jones* and *Reed*. A political party *does not* have a constitutional right to have its candidate on the general election ballot; however, it *does* have a constitutional right to nominate its "standard bearer." *Timmons*, 520 U.S. at 359, 117 S. Ct. 1364. The position advocated by the State transforms the party's right to "nominate" into a right to endorse. The Supreme Court rejected a similar argument with regard to California's Proposition 198: "[t]he ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee." *Jones*, 530 U.S. at 580, 120 S. Ct. 2402. To relegate the members of a political party to a role of mere support for their preferred "standard bearer," would deny a party its role in selecting its representative. Party members associational right to choose the "standard bearer" of the party cannot be so infringed, nor can the ability to nominate a party's chosen candidate be so easily disposed of.

"There is simply no substitute for a party's selecting its own candidates." *Jones*, 530 U.S. at 581, 120 S. Ct. 2402.

3. Selection by Voters at Large

The State of Washington and the Grange also argue that "[t]he candidates who appear on the general election ballot are selected by the voters at large, not by the parties or by the voters as party members," and therefore the candidates are not the parties' nominees. *See* State Response, docket no. 65, at 19 (emphasis omitted). The Grange

argues that Initiative 872 allows candidates to disclose the political party that the candidate prefers, and that unlike the blanket primary invalidated in *Reed*, Initiative 872 "does not require or force any political party to do anything." *See* Grange Response, docket no. 70, at 32 (emphasis omitted). These arguments have already been rejected by the Ninth Circuit in *Reed*, 343 F.3d at 1204 ("As for the State of Washington's argument that the party nominees chosen at blanket primaries 'are the nominees not of the parties but of the electorate,' that is the problem with the system, not a defense of it."). That conclusion is equally applicable here. The fact that voters at large will select the party's candidate indicates the Initiative 872 primary serves a nominating function. The major political parties may not be deprived of their rights simply because the primary system "does not require or force [the parties] to do anything."

It is similarly unhelpful to rename the nominating primary a "qualifying" primary. The Court must necessarily look beyond the characterization of the Initiative by its backers. Where the primary system under Initiative 872 selects from a slate of party candidates to advance two candidates to the general election, the system has the legal effect of "nominating" the party representatives in the partisan election.

4. Political "Preference" of Party Candidates

The State argues that "[s]ince party affiliation plays no role in determining which candidates advance to the general election, the primary

established by [Initiative 872] cannot in any way be regarded as determining party nominees," and that a statement of "party preference" does not imply nomination, endorsement, or support of any political party. *See* State Response, docket no. 65, at 19-20. The Grange also argues that any statement of party preference by a candidate is absolutely protected by the First Amendment. These arguments also must fail. Party affiliation undeniably plays a role in determining the candidate voters will select, whether it is characterized as "affiliation" or "preference." *Tashjian*, 479 U.S. at 220, 107 S. Ct. 544. Party labels provide a shorthand designation of the views of party candidates on matters of public concern and play a role in the exercise of voting rights. *Id.* Candidates identified with their "preferred" party designation will "carry [the party] standard in the general election." *See* Republican Opening Brief, docket no. 49, at 7. Any attempt to distinguish a "preferred" party from an "affiliated" party is unavailing in light of Washington law. *See* Wash. Rev. Code § 29A.24.030 ("Included on the standard form shall be . . . [f]or partisan offices only, a place for the candidate to indicate his or her major or minor party preference, or independent status"); Wash. Rev. Code § 29A.52 311 (County Auditors required to publish notice of the election with "the proper party designation" of each candidate); Wash Rev. Code § 29A.52.112(3) (Candidate expressing a political party "preference" will have that preference "shown after the name of the candidate on the primary and general election ballots."); *see also* Pharris Decl., docket no. 66, Ex. A (2004 Voters' Pamphlet at 11) ("The primary ballot [under

Initiative 872] would include . . . major party and minor party candidates and independents.").

The association of a candidate with a particular party may be the single most effective way to communicate to voters what the candidate represents. *See Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992) ("[P]arty candidates are afforded a 'voting cue' on the ballot in the form of a party label which research indicates is the most important determinant of voting behavior. Many voters do not know who the candidates are or who they will vote for until they enter the voting booth.").

The Grange's characterization of ballot labels of "party preference" as a permissible exercise of free speech must also fail. An individual has no right to associate with a political party that is an "unwilling partner." *See Duke v. Cleland*, 954 F.2d 1526, 1530 (11th Cir. 1992), *cert. denied*, 502 U.S. 1086, 112 S. Ct. 1152, 117 L. Ed. 2d 279 (1992). This is not an infringement on the candidate's rights because the political party has a right "to identify the people who constitute the association and to limit the association to those people only." *Id.* at 1531 (internal quotations omitted). Free speech rights of a candidate "do not trump the [political party's] right to identify its membership based on political beliefs . . . ." *Duke v. Massey*, 87 F.3d 1226, 1232-33 (11th Cir. 1996). A candidate's free speech right to express a "preference" for a political party does not extend to disrupting the party's First Amendment associational rights. *See generally Storer v. Brown*, 415 U.S. 724, 736, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974) (upholding California statute designed to protect the parties and party system against the

disorganizing effect of independent candidacies launched by unsuccessful putative party nominees).

5. The *Jones* Dicta: "Nonpartisan Blanket Primary"

The Court in *Jones* suggested in dicta that a "nonpartisan blanket primary" could protect important state interests and voter choice, with "all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee." *Jones*, 530 U.S. at 585-86, 120 S. Ct. 2402.

The State and the Grange rely heavily on the following statement from *Jones:*

> [California] could protect [its interests] by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot-which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State

> may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"-all without severely burdening a political party's First Amendment right of association.

Jones, 530 U.S. at 585-86, 120 S. Ct. 2402. According to the Grange, which sponsored Initiative 872, it "specifically drafted Initiative 872 to conform to [the Supreme Court ruling in *Jones*,]" and its description of a *nonpartisan* blanket primary. *See* White Decl., docket no.8, Ex. 4 ("Advantages of a Qualifying Primary for Washington State").

The Court gives great weight to the *Jones* Court's suggestion in analyzing the constitutionality of Initiative 872. However, a careful analysis of *Jones* and this "suggestion" indicates that it cannot save Initiative 872 from its demise.

Initiative 872 does not establish a "nonpartisan blanket primary." Primary voters are choosing a party's nominee. Initiative 872 burdens the rights of the political parties to choose their own nominee by compelling the parties to accept any candidate who declares a "preference" for the party, and allowing unaffiliated voters to participate in the selection of the party's candidate.

Plaintiffs' claim that Initiative 872 "denies party adherents the opportunity to nominate their party's candidate free of the risk of being swamped by voters whose preference is for the other party," *see Reed*, 343 F.3d at 1204, is well grounded. *Jones* allows little room for "outside" involvement in "intraparty" competition. *See Jones*, 530 U.S. at 572, 120 S. Ct. 2402. This is confirmed by Justice

Stevens' dissenting opinion. *See id.* at 598, n. 8, 120 S. Ct. 2402 ("It is arguable that, under the Court's reasoning combined with *Tashjian*, the only nominating options open for the States to choose without party consent are (1) to not have primary elections; or (2) to have what the Court calls a 'nonpartisan blanket primary' . . . in which candidates previously nominated by the various political parties and independent candidates compete.") (Stevens, J., dissenting).

6. Initiative 872 Nominates Candidates

In all constitutionally relevant respects, Initiative 872 is identical to the blanket primary invalidated in *Reed:* (1) Initiative 872 allows candidates to designate a party preference when filing for office, without participation or consent of the party;[18] (2) requires that political party candidates be nominated in Washington's primary; (3) identifies candidates on the primary ballot with party preference; (4) allows voters to vote for any candidate for any office without regard to party preference; (5) allows the use of an open, consolidated primary ballot that is not limited by political party and allows crossover voting; and (6) advances candidates to the general election based on open, "blanket" voting.

Because Initiative 872 constitutes a

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[18] The parties disagree as to whether minor party candidates are nominated through the nominating process described in Wash. Rev. Code §§ 29A.20.110 through 29A.20.201. *See* Section VI.C, *infra*. The parties also disagree as to the applicability of Initiative 872 to minor parties.

nominating process, the Court must address the question of Plaintiffs' associational rights, and the extent of the burden imposed on those rights by Initiative 872.[19]

B. Does Initiative 872 violate the First Amendment by compelling a political party to associate with unaffiliated voters and members of other political parties in the selection of its nominees?

Plaintiffs argue Initiative 872 imposes an

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[19] The political parties argue in the alternative that if Initiative 872 is *not* a nominating primary, it would be unconstitutional for violation of the parties' First Amendment associational right to select candidates for public office. It is well settled that political parties have a constitutionally protected right to nominate their candidates for partisan office. *See Jones*, 530 U.S. at 575, 120 S. Ct. 2402; *Clingman*, 125 S. Ct. at 2042 (O'Connor, J., concurring) (a basic function of a political party is to select candidates to be offered to voters in general elections); *Eu*, 489 U.S. at 224, 109 S. Ct. 1013 (party entitled to select the "standard bearer who best represents the party's ideologies and preferences.").

First Amendment associational rights are no less protected where the State effects a primary system that eliminates the party's right to nominate its own candidates. In such a circumstance, the affected political party is entitled to hold a caucus or convention to nominate its candidates for partisan office. Similarly, the party is entitled to prevent non-affiliated candidates from expressing a party preference or affiliation on the primary or general election ballot. The choice of party nominee is "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Jones*, 530 U.S. at 575, 120 S. Ct. 2402 (internal quotation marks and citation omitted). The State cannot deprive political parties of their right to choose the candidate of their choice.

unconstitutional burden on the political parties' First Amendment associational rights by (1) interfering with the parties' right to determine the limits of voter association in the selection of the party candidates; and (2) imposing forced political association with any candidate who may self-designate a party "preference," which will be displayed on the ballot.[20]

1. Candidate Selection

The freedom to join together in furtherance of common political beliefs "necessarily presupposes the freedom to identify the people who constitute the association," *Tashjian*, 479 U.S. at 214, 107 S. Ct. 544, and "the right not to associate" with individuals who do not share common beliefs. *Jones*, 530 U.S. at 574, 120 S. Ct. 2402.

> Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.

Id. at 574-75, 120 S. Ct. 2402. "[A] basic function of a political party is to select the candidates for public office to be offered to the voters at general elections."

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[20] The State of Washington admits that "if the Court found . . . a [non-party] candidate's option to express a political party preference . . . sufficient to render the 'top two' primary a party nomination system, that would indeed trigger a need to respect the associational interests of the political parties." *See* State Response, docket no. 65, at 25. However, the State contends that it would not necessarily follow that Initiative 872 is unconstitutional. *Id.* at 25 n. 19; *see also* Section VII, *infra*.

Clingman, 125 S. Ct. at 2042 (O'Connor, J., concurring) (internal quotations omitted). First Amendment associational rights in this context allow the party to select the "standard bearer who best represents the party's ideologies and preferences." *Eu*, 489 U.S. at 224, 109 S. Ct. 1013.

Initiative 872 nominates political party candidates for office, and allows voters to choose any candidate, regardless of political affiliation. Initiative 872 therefore impermissibly "denies party adherents the opportunity to nominate their party's candidate free of the risk of being swamped by voters whose preference is for the other party." *Reed*, 343 F.3d at 1204. "In no area is the political association's right to exclude more important than in the process of selecting its nominee." *Jones*, 530 U.S. at 575, 120 S. Ct. 2402.

Where a statutory scheme imposes a severe burden on core First Amendment rights, the scheme must be found unconstitutional unless the State affirmatively demonstrates that the scheme is narrowly tailored to advance a compelling state interest. *Reed*, 343 F.3d at 1204. The State of Washington and the Washington State Grange argue that Initiative 872 does not impose a severe burden on core First Amendment rights, but do not argue that Initiative 872 is narrowly tailored to meet a compelling state interest. The Court concludes as a matter of law that Initiative 872 "forces political parties to associate with-to have their nominees, and hence their positions, determined by-those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." *Jones*, 530 U.S. at 577, 120 S. Ct. 2402.

2. Candidate Party Preference

Plaintiffs argue that Washington's filing statute, Wash. Rev. Code § 29A.24.030,[21] violates the parties' First Amendment associational rights by forcing the political parties to associate with any candidate who expresses a "preference" for a political party. Initiative 872 provides that any candidate may self-designate a party preference and that party's name will be printed on public ballots and in voters' guides after the candidate's name. *See* Wash. Rev. Code § 29A.24.030 ("Included on the standard form shall be . . . [f]or partisan offices only, a place for the candidate to indicate his or her major

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[21] Initiative 872 revised Wash. Rev. Code § 29A.24.030, Washington's filing statute, to include on the ballot "a place for the candidate to indicate his or her major or minor party preference, or independent status," *see* Initiative 872, Sec. 9(3), without "cognizance" of the statute's repeal by 2004 c 271§ 193 in favor of Washington's new filing statute: Wash. Rev. Code § 29A.24.031. *See* Wash. Rev. Code § 29A.24.030, Reviser's Note. Under statutory rules of construction in Wash. Rev. Code § 1.12.025, amended statute Wash. Rev. Code § 29A.24.030 was given effect as amended by Initiative 872. *See* Wash. Rev. Code § 29A.24.030, Reviser's Note; *see also* Initiative 872, Sec. 9(3).

The difference between Washington's two filing statutes is not significant to the Court's analysis. *Compare* Wash. Rev. Code § 29A.24.030 ("major or minor party preference") *with* Wash. Rev. Code § 29A.24.031 ("party designation"). The parties base their analysis on Washington's filing statute as amended by Initiative 872, *see* Democratic Party Opening Br., docket no. 55, at 20-21; or both statutes together. *See* Republican Opening Br., docket no. 49, at 8-11. The Court, however, will limit its consideration to Washington's filing statute as amended by Initiative 872: Wash. Rev. Code § 29A.24.030.

or minor party preference, or independent status"); Wash Rev. Code § 29A.52.112 (Candidate expressing a political party "preference" will have that preference "shown after the name of the candidate on the primary and general election ballots."). County Auditors are also required to publish notice of the election with "the proper party designation" of each candidate. Wash. Rev. Code § 29A.52.311.

In this case the political parties seek relief beyond protecting their rights to nominate candidates. The parties seek to exclude all other candidates on the primary ballot from using similar party preferences. Neither the State nor the Grange disputes that a political party has an inherent right to nominate its own candidates. *See* State Response, docket no. 65, at 24; Grange Response, docket no. 70, at 27. The right to nominate is a constitutionally protected right of association. Under Initiative 872, political parties are given no choice with respect to whether such public association is made. The parties argue that the filing statutes force the parties to be affiliated with candidates that may qualify under party rules, or may be hostile to the party. The Defendants argue that "forced association" will not occur because "party preference" statements do not imply the nomination, endorsement, or support of any political party. *See* State Response, docket no. 65, at 20. However, rather than meet their burden to justify Initiative 872, the State and the Grange argue that candidates who appear on the primary and general election ballots are not candidates "of the party," even though they are

identified on the ballot as associated with the party. This defense was previously rejected in *Reed*. 343 F.3d at 1204; *see also* Section VI.A.3, *supra*.

Party affiliation plays a role in determining which candidates voters select, whether characterized as "affiliation" or "preference." *Tashjian*, 479 U.S. at 220, 107 S. Ct. 544. The top two nature of the primary does not cure this defect. Parties cannot be forced to associate on a ballot with unwanted party adherents. *See* Section VI.A.4, *supra*. The right to select the candidate that will appear on the ballot is important to political parties that invest substantial money and effort in developing a party name. Party name and affiliation communicate meaningful political information to the electorate.[22] The Democratic Party argues that it has expended considerable time and expense to develop a coherent set of goals and principles that guide the party, and that candidates asserting an affiliation with the party will receive numerous votes based solely on their proclaimed affiliation with the party, and implied adoption of its message and principles. Even non-commercial associations are entitled to protect their name against misappropriation and misuse. *See, e.g., Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Universal Grand Lodge*, 62 Wash. 2d 28, 35, 381 P.2d 130 (Wash. 1963) ("The underlying

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[22] The Libertarian Party notes that the name "Libertarian Party" is a registered trademark, and accordingly argues that the Libertarian Party has a proprietary right to determine who may use the name, and for what purposes it may be used. *See* Libertarian Opening Br., docket no. 52, at 14.

concept is that of unfair competition in matters in which the public generally may be deceived or misled."); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 566, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (private association could not be required to admit a parade contingent expressing message not of the organizers' choosing); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000) (First Amendment protects Boy Scouts' right to exclude leader whose presence would express a message at odds with Boy Scout policies). The Court is persuaded by Plaintiffs' arguments that allowing *any* candidate, including those who may oppose party principles and goals, to appear on the ballot with a party designation will foster confusion and dilute the party's ability to rally support behind its candidates.

Initiative 872 imposes a severe burden on the Plaintiffs' First Amendment right to associate on two separate grounds: (1) Initiative 872 forces political parties' to have their nominees chosen by voters who have refused to affiliate with the party and may have affiliated with a rival; and (2) Initiative 872 forces the parties to associate with any candidate who expresses a party "preference." Because Initiative 872 is not narrowly tailored to advance a compelling state interest, the Court concludes that it is unconstitutional. *Reed*, 343 F.3d at 1203-04.

C. Initiative 872 and Minor Parties

The various parties in this litigation dispute Initiative 872's impact on minor parties. The Plaintiffs argue that Initiative 872's provision that only the top two candidates in the primary will be

placed on the general ballot unconstitutionally restricts minor parties' access to the ballot. Additionally, in its Supplement to its Motion for Summary Judgment, the Republican Party requests a finding that Initiative 872 is unconstitutional because it violates the constitutional right to equal protection under the law. The Republican Party contends that "Initiative 872 violates the Equal Protection Clause by allowing minor political parties to nominate candidates and control their message, but denying the same right to the [major political parties.]" *See* Republican Supplement, docket no. 63, at 4. The Grange and the State argue that Initiative 872 supplanted and superseded any inconsistent provisions in the Revised Code of Washington, including those that treat minor parties differently. *See* State Response, docket no. 65, at 31 n.23; Grange Response, docket no. 70, at 21 n.30.

In order to evaluate the parties' allegations regarding Initiative 872's treatment of minor parties, the Court must determine whether Initiative 872 would provide different rights to the various political parties. The question presented is whether Initiative 872 repealed expressly or by implication the minor party nominating provisions.[23]

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[23] The Montana system, adopted in 2004, treats minor party nominees differently. Under the Montana system, minor party nominees would still be selected through a nominating convention. Wash. Rev. Code § 29A.20.121(1). However, they would then proceed directly to the general ballot after submitting a nominating petition containing the requisite number of signatures. Wash. Rev. Code §§ 29A.20.121, 29A.20.141.

Initiative 872 did not expressly repeal, amend, or otherwise address the minor party nominating statutes, Wash. Rev. Code §§ 29A.20.110-29A.20.201. Initiative 872, Sec. 17. The State and the Grange contend that Initiative 872 repealed by implication all of the previous minor party nominating statutes because the Initiative covers the entire subject matter of primary and general election procedures and was intended to supersede the prior legislation on the subject.

The language of Initiative 872 appears to preclude minor party nominees from appearing on the general election ballot without first having appeared on a primary election ballot. Section 5 of Initiative 872 defines a primary as "a procedure for winnowing candidates for public office to a final list of two as part of a special or general election." Initiative 872, Sec. 5. The language of a "final list of two" candidates for "public office" does not appear to leave room for additional, minor party candidates on the general election ballot. Section 6(1) states that, "[f]or any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot." Initiative 872, Sec. 6(1). This language implies that in an election for any office in which a primary was held, only two candidates may appear on the general election ballot. Initiative 872, Sec. 7(2) ("Whenever candidates for a partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter. Based upon votes cast at the primary, the top two candidates will be certified as qualified to appear on the general election ballot . . ."). Finally, Section 9(3) refers to minor party candidates and

provides that the form for declaration of candidacy must have, "[f]or partisan offices only, a place for the candidate to indicate his or her major or minor party preference, or independent status." Initiative 872, Sec. 9(3).

The State of Washington 2004 Voter's Pamphlet states in part that "[t]he initiative would replace the system of separate primaries for each party" and that "[t]he primary ballot would include all candidates filing for the office, including both major party and minor party candidates and independents." Pharris Decl., docket no. 66, Ex. A (2004 Voters Pamphlet at 11). Finally, the explanation statement provides "[t]he measure would replace existing provisions that candidates of each major political party, as well as any minor party or independent candidates who qualify, appear on the general election ballot."[24] *Id.*

The Montana system's provision dictating that minor party candidates proceed directly to the general election ballot is in direct conflict with the primary system enacted under Initiative 872 in which all candidates for partisan office must submit to the primary in order to winnow the final list down to two. Similarly, under the prior blanket primary system, minor party nominees advanced to the general ballot if they received at least one percent of

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[24] When the language of an initiative is ambiguous, the Court may look to the voters' pamphlet to ascertain the intent of the voters who approved it. *Save Transit v. Sound Transit*, 151 Wash. 2d 60, 90, 85 P.3d 346 (2004) (citing *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 205-06, 11 P.3d 762 (2000)).

the total vote cast in the primary for that office. This provision is also inconsistent with Initiative 872's provisions allowing only the top two candidates to advance to the general election.

Repeal by implication is strongly disfavored. *State v. Lessley*, 118 Wash. 2d 773, 782, 827 P.2d 996 (1992); *Washington State Welfare Rights Org. v. State*, 82 Wash. 2d 437, 439, 511 P.2d 990 (1973) (internal citations omitted). Under Washington law, a statute will be deemed to be impliedly repealed only if: "[T]he later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the subject, or unless the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot, by a fair and reasonable construction, be reconciled and both given effect." *Washington Federation of State Employees v. The Office of Financial Management*, 121 Wash. 2d 152, 165, 849 P.2d 1201 (1993).

The Court concludes as a matter of law that it was the intent of the voters who enacted Initiative 872 that it be a complete act in itself and cover the entire subject matter of earlier legislation governing minor parties.[25]

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[25] The Court reluctantly holds that Initiative 872 repealed by implication the minor party nominating statutes. There are undoubtedly many voters in Washington whose political philosophies do not neatly square with those of either of the two major political parties, as well as voters who find these parties' philosophies antithetical to their own vision of good governance. For many voters, the minor parties have provided a vital means to advocate on behalf of their vision for this State. The Supreme Court has noted that minor parties

Because the Court declares Initiative 872 unconstitutional on other grounds, and further concludes that minor parties would be treated the same as all other parties if it was constitutional, the Court does not reach the equal protection argument raised by the Republican Party. Similarly, the Court does not reach the minor party ballot access issue.

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have played an indispensable role in the nation's political process:

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted . . . . The absence of such voices would be a symptom of grave illness in our society.

Sweezy v. New Hampshire, 354 U.S. 234, 250-51, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957). Initiative 872, if otherwise valid would significantly alter Washington State's political landscape and severely limit the important role of minor parties in the State's political process. This would remove from the general election the ability to choose candidates from a broad political spectrum. The scope of voters' disenfranchisement would be enormous. As Governor Locke noted in vetoing a similar top two alternative in 2004:

> Minority parties bring diverse perspectives to political debate and additional choice to voters. They should not be foreclosed from meaningful participation in the democratic process.

E.S.B. 6453, 58th Leg., 2004 Reg. Sess. (Wash. 2004) (Governor's Veto Message). However, whether and to what extent the State should limit minority participation is obviously a policy issue to be decided by the Legislature or by the voters by Initiative.

X. THE SEVERABILITY OF INITIATIVE 872

If any portions of Initiative 872 are unconstitutional, the Court must determine whether the unconstitutional provisions can be severed from the remaining constitutional provisions. The State, the Grange, and the Democratic Party all contend that Initiative 872 is severable. The Republican Party argues that it is not severable.

Washington law governs the question of the severability of a Washington initiative. In *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 109 P.3d 405 (2005), the Washington Supreme Court described the test to determine whether unconstitutional statutory provisions can be severed as follows:

> Ordinarily, only the part of an enactment that is constitutionally infirm will be invalidated, leaving the rest intact. An unconstitutional provision may not be severed, however, if its connection to the remaining, constitutionally sound provision is so strong "that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature." Also, the court is obliged to strike down the entire act if the result of striking only the provision is to give the remainder of the statute a much broader scope.

Guard v. Jackson, 83 Wash. App. 325, 333, 921 P.2d 544 (1996) (footnotes omitted) (quoting *Leonard v. City of Spokane*, 127 Wash. 2d 194, 201, 897 P.2d 358 (1995)).

In addition, unless the Court can conclude that the voters in the initiative process would have passed Initiative 872 absent any unconstitutional provisions, the proper remedy is invalidation rather than changing the Initiative. *Griffin v. Eller*, 130 Wash. 2d 58, 69-70, 922 P.2d 788 (1996). *See also National Advertising Co. v. Orange*, 861 F.2d 246 (9th Cir. 1988).

Initiative 872 does not have a severability clause. The presence of an applicable severability clause is some evidence that the voters would have enacted the constitutional portions of the Initiative without the unconstitutional portions, but a severability clause is not necessary in order to meet the severability test. *See In re Parentage of C.A.M.A.*, 154 Wash. 2d at 67-68, 109 P.3d 405.

When determining if the Initiative is severable, the Court must take care not to rewrite legislation. "Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *United States v. Rutherford*, 442 U.S. 544, 555, 99 S. Ct. 2470, 61 L. Ed. 2d 68 (1979). To apply these rules in the context of this case, the Court must look at what must be severed for Initiative 872 to meet

constitutional standards and how the remainder of the Initiative would realize the intent of voters who enacted it. The suggestions for severance offered by the parties fall short.

The State argues that the Court should "allow the State to adjust the specific problem the Court found [in Initiative 872] while maintaining the basic machinery of the 'top two' primary." State Response, docket no. 65, at 34. The State suggests that "the portions of Initiative 872 that appears [sic] to draw the most fire are Sections 7 and 9, the provisions that permit candidates to declare their 'political party preference' and provide that this information will appear on the ballot." *Id.*

The Grange argues that the Court should preserve Sections 1 and 2 of the Initiative, which it argues express the Initiative's intent. Grange's Response, docket no. 70, at 38. The Grange also argues that the only allegedly offending sections of Initiative 872 are Section 7(3), providing for candidates to indicate a political preference which will be shown on ballots "for the information of the voters," and Section 11, which provides that the candidate's party "preference" will be included in the State voters' pamphlet. *Id.* at 36.

The Democratic Party argues that if the Court concludes that the voters were primarily interested in limiting the number of candidates on the general election ballot to no more than two and that voters viewed as only incidental the creation of a non-party member's right to choose a party's candidate, the Court could sever the Initiative. Democratic Reply, docket no. 75, at 10. The Democratic Party argues

that the Court "need only hold that the Initiative's requirement that a political party name be printed after a candidate's name is applicable if, and only if, the candidate has first been selected by the political party whose name he or she seeks to invoke, pursuant to the rules of that party." *Id.* Implementing this recommendation would require the Court to fundamentally rewrite the Initiative.

Several portions of Initiative 872 are unconstitutional because they violate Plaintiffs' First Amendment rights. In order to sever the offending sections of Initiative 872, the Court would need to sever most of Section 4, which defines a "partisan office" as one "for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name"; Section 5, which redefines Primary or Primary Election. replaces "nominating" with "winnowing," and allows the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate; Sections 7(2) and (3), which affix a candidate's party preference next to that candidate's name on both the primary and the general election ballot; Section 9(3), which provides a place on the declaration of candidacy for a candidate to state his or her major or minor party preference; Section 11, which states that the voters' pamphlet must also contain the political party preference or independent status of the candidate where the candidate expresses a preference; and Section 12, which provides that the certified list of candidates shall include each candidates' party

preference. Initiative 872, Secs. 4, 5, 7(2), 7(3), 9(3), 11, 12. The effect of these deletions would be to substantially dismantle the partisan primary system adopted by Initiative 872. These deletions would eliminate any reference to party preference or affiliation, and would convert a partisan election process into a nonpartisan election process.

The Court must determine whether the connection between the potentially severable parts "and the remaining constitutionally sound provision is so strong 'that it could not be believed that [the voters] would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of [the voters].' " *Guard v. Jackson*, 83 Wash. App. 325, 333, 921 P.2d 544 (1996). "When the people approve an initiative measure, they exercise the same power of sovereignty as the legislature does when it enacts a statute. Once enacted, initiatives are interpreted according to the same rules of statutory construction as apply to the legislature's enactments. Thus, the court's aim is to determine the collective intent of the people who enacted the measure." *McGowan v. State*, 148 Wash. 2d 278, 288, 60 P.3d 67 (2002) (internal citations omitted). The Court may look to the plain language of the Initiative itself in order to determine the intent of the voters who enacted it. *Id.*

The Court concludes as a matter of law that Initiative 872 is not severable. The deletion of the unconstitutional portions of the Initiative leaves virtually nothing left of the system approved by the voters.

XI. EFFECT OF THE INVALIDITY OF INITIATIVE 872

Declaring Initiative 872 unconstitutional will not leave Washington without a primary system. Enjoining the implementation of Initiative 872 will return Washington to the Montana primary system enacted before Initiative 872 was approved by the voters.

The effect of the invalidity of a state statute is governed by state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Washington law holds that an invalid statute is a nullity. "It is as inoperative as if it had never been passed." *State v. Speed*, 96 Wash. 2d 838, 843, 640 P.2d 13 (1982) (citing *State ex. rel. Evans v. Brotherhood of Friends*, 41 Wash. 2d 133, 143, 247 P.2d 787 (1952)). The Washington Supreme Court has held that the natural effect of this rule is that once the invalid statute has been declared a nullity, it leaves the law as it stood prior to the enactment of the invalid statute. *Id.* (citing *Boeing Co. v. State*, 74 Wash. 2d 82, 89, 442 P.2d 970 (1968)). In this case, the Court's holding that Initiative 872 is unconstitutional renders it a nullity, including any provisions within it purporting to repeal sections of the Revised Code of Washington. Therefore, the law as it existed before the passage of Initiative 872, including the Montana primary system, stands as if Initiative 872 had never been approved.

XII. CONCLUSION

For the reasons stated in this Order, the Court concludes as follows:

1. The implementation of Initiative 872 will severely burden the First Amendment rights of Washington's political parties by (a) allowing any voter, regardless of their affiliation to a party, to choose a party's nominee, *Jones*, 530 U.S. at 586, 120 S. Ct. 2402; and (b) allowing any candidate, regardless of party affiliation or relationship to a party, to self-identify as a member of a political party and to appear on the primary and general election ballots as a candidate for that party. *Reed*, 343 F.3d at 1204.

2. Initiative 872 is not narrowly tailored to serve any legitimate and compelling state interest. *Timmons*, 520 U.S. at 358, 117 S. Ct. 1364.

3. Initiative 872 is unconstitutional in violation of the First Amendment to the United States Constitution.

For the reasons set forth herein, the Court GRANTS Plaintiffs' Motions for Summary Judgment, docket nos. 49, 52, and 55 to the extent provided in this Order, and DENIES the State's Cross-Motion for Summary Judgment, docket no. 65.

The Court hereby GRANTS all Plaintiffs a Preliminary Injunction as follows:

1. The Court enjoins the State of Washington, or any political subdivision of the State, from enforcing, implementing, or conducting any election

pursuant to the provisions of Initiative 872, as codified in Title 29A, Wash. Rev. Code.

2. The Court enjoins the State of Washington, or any political subdivision of the State, from enforcing or implementing the filing statute under Initiative 872, Wash. Rev. Code § 29A.24.030, as part of any primary or general election.

3. This injunction shall remain in effect until a permanent injunction is entered consistent with this Order.

4. Plaintiffs are directed to prepare, serve, and file a proposed permanent injunction consistent with this Order by July 22, 2005. Defendants may file any objection by July 27, 2005 and the Court will thereafter enter a permanent injunction.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

and

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

and

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff Intervenors,

v.

DEAN LOGAN, King County Records & Elections Division Manager, et al.,

Defendants,

STATE OF WASHINGTON,

Defendant Intervenors,

and

WASHINGTON STATE GRANGE,

Defendant Intervenors.

No. C05-927Z

PERMANENT INJUNCTION

This matter comes before the Court on Plaintiffs' Proposed Permanent Injunction, docket no. 88, submitted in response to this Court's Order and Preliminary Injunction, docket no. 87, filed on July 15, 2005.

The Court hereby incorporates by reference its Order, docket no. 87, and enters the following Permanent Injunction:

1. The Court enjoins the State of Washington, or any political subdivision of the State, from enforcing, implementing, or conducting any election pursuant to the provisions of Initiative 872, as codified in Title 29A, Wash. Rev. Code.

2. The Court enjoins the State of Washington, or any political subdivision of the State, from enforcing or implementing the filing statute

under Initiative 872, Wash. Rev. Code § 29A.24.030, as part of any primary or general election.

3. The Court enjoins the State of Washington, or any political subdivision of the State, from refusing to recognize the validity of any minor party or independent candidate nominating convention held on or before August 27, 2005, on the grounds that the convention did not comply with the dates set forth in Wash. Rev. Code § 29A.20.121, provided that the notice provisions of Wash. Rev. Code § 29A.20.131 have been complied with and the convention otherwise complies with Title 29A.20, Wash. Rev. Code.

4. The Court retains jurisdiction in this action to enforce the terms of this injunction.

IT IS SO ORDERED.

DATED this 29th of July, 2005.

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Thomas S. Zilly
United States District Judge

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

FREEDOM OF RELIGION, SPEECH, AND OF THE PRESS. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Wash. Rev. Code 29A.04.086[1]
Major political party

"Major political party" means a political party of which at least one nominee for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year. A political party qualifying as a major political party under this section retains such status until the next even-year election at which a candidate of that party does not achieve at least five percent of the vote for one of the previously specified offices. If none of these offices appear on the ballot in an even-year general election, the major party retains its status as a major party through that election. However, a political party of which no nominee received at least ten percent of the total vote cast may forgo its status as a major political party by filing with the secretary of state an appropriate party rule within sixty days of attaining major party status under this section, or within fifteen days of June 10, 2004, whichever is later. [2004 c 271 § 103.]

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[1] Bracketed material in statutes appears in originals.

Wash. Rev. Code 29A.04.097
Minor political party.

"Minor political party" means a political organization other than a major political party. [2003 c 111 § 116. Prior: 1965 c 9 § 29.01.100; prior: 1955 c 102 § 8; prior: 1907 c 209 § 26, part; RRS § 5203, part. Formerly RCW 29.01.100.]

Wash. Rev. Code 29A.04.110
Partisan office
(Effective if unconstitutionality of Initiative Measure No. 872 is reversed by pending appeal.)

"Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name. The following are partisan offices:

(1) United States senator and United States representative;

(2) All state offices, including legislative, except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise.

Wash. Rev. Code 29A.04.127
Primary
(Effective if unconstitutionality of Initiative Measure No. 872 is reversed by pending appeal.)

"Primary" or "primary election" means a procedure for winnowing candidates for public office to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate. [2005 c 2 § 5 (Initiative Measure No. 872, approved November 2, 2004); 2003 c 111 § 122. Prior: 1965 c 9 § 29.01.130; prior: 1907 c 209 § 1, part; RRS § 5177(a). See also 1950 ex.s. c 14 § 2. Formerly RCW 29.01.130.]

Wash. Rev. Code 29A.04.128
Primary

"Primary" or "primary election" means a statutory procedure for nominating candidates to public office at the polls. [2004 c 271 § 152.]

Wash. Rev. Code 29A.04.206
Voters' rights
(Effective if unconstitutionality of Initiative Measure No. 872 is reversed by pending appeal.)

The rights of Washington voters are protected by its constitution and laws and include the following fundamental rights:

(1) The right of qualified voters to vote at all elections;

(2) The right of absolute secrecy of the vote. No voter may be required to disclose political faith or adherence in order to vote;

(3) The right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate. [2005 c 2 § 3 (Initiative Measure No. 872, approved November 2, 2004).]

Wash. Rev. Code 29A.20.121
Nomination by convention or write-in—Dates—Special filing period
(Effective until January 1, 2007.)

(1) Any nomination of a candidate for partisan public office by other than a major political party may be made only: (a) In a convention held not earlier than the last Saturday in June and not later than the first Saturday in July or during any of the seven days immediately preceding the first day for filing declarations of candidacy as fixed in accordance with RCW 29A.28.041; (b) as provided by RCW 29A.60.021; or (c) as otherwise provided in this section. Minor political party and independent candidates may appear only on the general election ballot.

(2) Nominations of candidates for president and vice president of the United States other than by a major political party may be made either at a convention conducted under subsection (1) of this

section, or at a similar convention taking place not earlier than the first Sunday in July and not later than seventy days before the general election. Conventions held during this time period may not nominate candidates for any public office other than president and vice president of the United States, except as provided in subsection (3) of this section.

(3) If a special filing period for a partisan office is opened under RCW 29A.24.211, candidates of minor political parties and independent candidates may file for office during that special filing period. The names of those candidates may not appear on the general election ballot unless they are nominated by convention held no later than five days after the close of the special filing period and a certificate of nomination is filed with the filing officer no later than three days after the convention. The requirements of RCW 29A.20.131 do not apply to such a convention.

(4) A minor political party may hold more than one convention but in no case shall any such party nominate more than one candidate for any one partisan public office or position. For the purpose of nominating candidates for the offices of president and vice president, United States senator, United States representative, or a statewide office, a minor party or independent candidate holding multiple conventions may add together the number of signatures of different individuals from each convention obtained in support of the candidate or candidates in order to obtain the number required by RCW 29A.20.141. For all other offices for which nominations are made, signatures of the requisite

number of registered voters must be obtained at a single convention. [2004 c 271 § 110.]

Wash. Rev. Code 29A.20.121
Nomination by convention or write-in—Dates—Special filing period
(Effective January 1, 2007.)

(1) Any nomination of a candidate for partisan public office by other than a major political party may be made only: (a) In a convention held not earlier than the first Saturday in May and not later than the second Saturday in May or during any of the seven days immediately preceding the first day for filing declarations of candidacy as fixed in accordance with RCW 29A.28.041; (b) as provided by RCW 29A.60.021; or (c) as otherwise provided in this section. Minor political party and independent candidates may appear only on the general election ballot.

(2) Nominations of candidates for president and vice president of the United States other than by a major political party may be made either at a convention conducted under subsection (1) of this section, or at a similar convention taking place not earlier than the first Saturday in June and not later than the fourth Saturday in July. Conventions held during this time period may not nominate candidates for any public office other than president and vice president of the United States, except as provided in subsection (3) of this section.

(3) If a special filing period for a partisan office is opened under RCW 29A.24.211, candidates of minor political parties and independent candidates may file for office during that special filing period. The names of those candidates may not appear on the general election ballot unless they are nominated by convention held no later than five days after the close of the special filing period and a certificate of nomination is filed with the filing officer no later than three days after the convention. The requirements of RCW 29A.20.131 do not apply to such a convention.

(4) A minor political party may hold more than one convention but in no case shall any such party nominate more than one candidate for any one partisan public office or position. For the purpose of nominating candidates for the offices of president and vice president, United States senator, United States representative, or a statewide office, a minor party or independent candidate holding multiple conventions may add together the number of signatures of different individuals from each convention obtained in support of the candidate or candidates in order to obtain the number required by RCW 29A.20.141. For all other offices for which nominations are made, signatures of the requisite number of registered voters must be obtained at a single convention. [2006 c 344 § 4; 2004 c 271 § 110.]

Wash. Rev. Code 29A.24.030
Declaration of candidacy
(Effective if unconstitutionality of Initiative Measure No. 872 is reversed by pending appeal.)

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) For partisan offices only, a place for the candidate to indicate his or her major or minor party preference, or independent status;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under *RCW 29A.24.090;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and

swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in *RCW 29A.24.090.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process. [2005 c 2 § 9 (Initiative Measure No. 872, approved November 2, 2004); 2003 c 111 § 603; 2002 c 140 § 1; 1990 c 59 § 82. Formerly RCW 29.15.010.]

Wash. Rev. Code 29A.24.031
Declaration of candidacy

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) A place for the candidate to indicate a party designation, if applicable;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under RCW 29A.24.091;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in RCW 29A.24.091.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process. [2004 c 271 § 158.]

Wash. Rev. Code 29A.36.010
Certifying primary candidates
(Effective if unconstitutionality of Initiative Measure No. 872 is reversed by pending appeal.)

On or before the day following the last day allowed for candidates to withdraw under *RCW 29A.24.130, the secretary of state shall certify to each county auditor a list of the candidates who have filed declarations of candidacy in his or her office for the primary. For each office, the certificate shall include the name of each candidate, his or her address, and his or her party preference or independent designation as shown on filed declarations. [2005 c 2 § 12 (Initiative Measure No. 872, approved November 2, 2004); 2003 c 111 § 901. Prior: 1990 c 59 § 8; 1965 ex.s. c 103 § 4; 1965 c 9 § 29.27.020; prior: 1949 c 161 § 10, part; 1947 c 234 § 2, part; 1935 c 26 § 1, part; 1921 c 178 § 4, part; 1907 c 209 § 8, part; Rem.Supp. 1949 § 5185, part. Formerly RCW 29.27.020.]

Wash. Rev. Code 29A.36.170
Top two candidates qualified for general election—Exception
(Effective if unconstitutionality of Initiative Measure No. 872 is reversed by pending appeal.)

(1) For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes

will appear first and the candidate who received the next greatest number of votes will appear second. No candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding primary, if a primary was conducted. On the ballot at the general election for an office for which no primary was held, the names of the candidates shall be listed in the order determined under *RCW 29A.36.130.

(2) For the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed for that position on the ballot at the general election. [2005 c 2 § 6 (Initiative Measure No. 872, approved November 2, 2004); 2003 c 111 § 917. Prior: 1992 c 181 § 2; 1990 c 59 § 95. Formerly RCW 29.30.085.]

Wash. Rev. Code 29A.36.171
Nonpartisan candidates qualified for general election

(1) Except as provided in RCW 29A.36.180 and in subsection (2) of this section, on the ballot at the general election for a nonpartisan office for which a primary was held, only the names of the candidate who received the greatest number of votes and the candidate who received the next greatest number of

votes for that office shall appear under the title of that office, and the names shall appear in that order. If a primary was conducted, no candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding primary. On the ballot at the general election for any other nonpartisan office for which no primary was held, the names of the candidates shall be listed in the order determined under RCW 29A.36.131.

(2) On the ballot at the general election for the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, judge of the district court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed under the title of the office for that position. [2004 c 271 § 170.]

Wash. Rev. Code 29A.36.191
Partisan candidates qualified for general election

The name of a candidate for a partisan office for which a primary was conducted shall not be printed on the ballot for that office at the subsequent general election unless, at the preceding primary, the candidate receives a number of votes equal to at least one percent of the total number of votes cast for all candidates for that office and a plurality of the votes cast by voters affiliated with that party for

candidates for that office affiliated with that party. [2004 c 271 § 133.]

Wash. Rev. Code 29A.36.201
Names qualified to appear on election ballot

The names of the persons certified as nominees by the secretary of state or the county canvassing board shall be printed on the ballot at the ensuing election.

No name of any candidate whose nomination at a primary is required by law shall be placed upon the ballot at a general or special election unless it appears upon the certificate of either (1) the secretary of state, or (2) the county canvassing board, or (3) a minor party convention or the state or county central committee of a major political party to fill a vacancy on its ticket under RCW 29A.28.021.

Excluding the office of precinct committee officer or a temporary elected position such as a charter review board member or freeholder, a candidate's name shall not appear more than once upon a ballot for a position regularly nominated or elected at the same election. [2004 c 271 § 171.]

Wash. Rev. Code 29A.52.111
Application of chapter—Exceptions

Candidates for the following offices shall be nominated at partisan primaries held pursuant to the provisions of this chapter:

(1) Congressional offices;

(2) All state offices except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices where a county home rule charter provides otherwise. [2004 c 271 § 173.]

Wash. Rev. Code 29A.52.116
Application of chapter—Exceptions

Major political party candidates for all partisan elected offices, except for president and vice president, precinct committee officer, and offices exempted from the primary under *RCW 29A.52.011, must be nominated at primaries held under this chapter. [2004 c 271 § 139.]

Wash. Rev. Code 29A.52.231
Nonpartisan offices specified

The offices of superintendent of public instruction, justice of the supreme court, judge of the court of appeals, judge of the superior court, and

judge of the district court shall be nonpartisan and the candidates therefor shall be nominated and elected as such.

All city, town, and special purpose district elective offices shall be nonpartisan and the candidates therefor shall be nominated and elected as such. [2004 c 271 § 174.]

INITIATIVE 872

I, Sam Reed, Secretary of State of the State of Washington and custodian of its seal, hereby certify that, according to the records on file in my office, the attached copy of Initiative Measure No. 872 to the People is a true and correct copy as it was received by this office.

AN ACT Relating to elections and primaries; amending RCW 29A.04.127, 29A.36.170, 29A.04.310, 29A.24.030, 29A.24.210, 29A.36.010, 29A.52.010, 29A.80.010, and 42.12.040; adding a new section to chapter 29A.04 RCW; adding a new section to chapter 29A.52 RCW; adding a new section to chapter 29A.32 RCW; creating new sections; repealing RCW 29A.04.157, 29A.28.010, 29A.28.020, and 29A.36.190; and providing for contingent effect.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

TITLE

NEW SECTION. Sec. 1. This act may be known and cited as the People's Choice Initiative of 2004.

LEGISLATIVE INTENT: PROTECTING VOTERS' RIGHTS AND CHOICE

NEW SECTION. Sec. 2. The Washington Constitution and laws protect each voter's right to vote for any candidate for any office. The Washington State Supreme Court has upheld the blanket primary as protecting compelling state interests "allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the

primary." Heavey v. Chapman, 93 Wn.2d 700, 705, 611 P.2d 1256 (1980). The Ninth Circuit Court of Appeals has threatened this system through a decision, that, if not overturned by the United States Supreme Court, may require change. In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective to implement a system that best protects the rights of voters to make such choices, increases voter participation, and advances compelling interests of the state of Washington.

WASHINGTON VOTERS' RIGHTS

NEW SECTION. Sec. 3. The rights of Washington voters are protected by its Constitution and laws and include the following fundamental rights:

(1) The right of qualified voters to vote at all elections;

(2) The right of absolute secrecy of the vote. No voter may be required to

disclose political faith or adherence in order to vote;

(3) The right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.

DEFINITIONS

NEW SECTION. Sec. 4. A new section is added to chapter 29A.04 RCW to read as follows:

"Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general

election ballot in conjunction with his or her name. The following are partisan offices:

(1) United States senator and United States representative;

(2) All state offices, including legislative, except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise.

Sec. 5. RCW 29A.04.127 and 2003 c 111 § 122 are each amended to read as follows:

"Primary" or "primary election" means a ((statutory)) procedure for ((nominating)) winnowing candidates ((to)) for public office ((at the polls)) to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.

Sec. 6. RCW 29A.36.170 and 2003 c 111 § 917 are each amended to read as follows:

(1) ((Except as provided in RCW 29A.36.180 and in subsection (2) of this section, on the ballot at the general election for a nonpartisan)) For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name((s)) of the candidate who received the greatest number of votes will appear first and the candidate who received the next greatest number of votes ((for that office shall appear under the title of that office, and the names shall appear in that

order. If a primary was conducted,)) will appear second. No candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding primary, if a primary was conducted. On the ballot at the general election for ((any other nonpartisan)) an office for which no primary was held, the names of the candidates shall be listed in the order determined under RCW 29A.36.130.(2) ((On the ballot at the general election)) For the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed ((under the title of the office)) for that position on the ballot at the general election.

NEW SECTION. Sec. 7. A new section is added to chapter 29A.52 RCW to read as follows:

(1) A primary is a first stage in the public process by which voters elect candidates to public office.

(2) Whenever candidates for a partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter. Based upon votes cast at the primary, the top two candidates will be certified as qualified to appear on the general election ballot, unless only one candidate qualifies as provided in RCW 29A.36.170.

(3) For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and

general election ballots by appropriate abbreviation as set forth in rules of the secretary of state. A candidate may express no party or independent preference. Any party or independent preferences are shown for the information of voters only and may in no way limit the options available to voters.

CONFORMING AMENDMENTS

Sec. 8. RCW 29A.04.310 and 2003 c 111 § 143 are each amended to read as follows:

((Nominating)) Primaries for general elections to be held in November must be held on:

(1) The third Tuesday of the preceding September; or ((on))

(2) The seventh Tuesday immediately preceding ((such)) that general election, whichever occurs first.

Sec. 9. RCW 29A.24.030 and 2003 c 111 § 603 are each amended to read as follows:

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the

office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) For partisan offices only, a place for the candidate to indicate ((a)) his or her major or minor party ((designation, if applicable)) preference, or independent status;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under RCW 29A.24.090;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in RCW 29A.24.090.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process.

Sec. 10. RCW 29A.24.210 and 2003 c 111 § 621 are each amended to read as follows:

Filings for a partisan elective office shall be opened for a period of three normal business days whenever, on or after the first day of the regular filing period and before the sixth Tuesday prior to ((a primary)) an election, a vacancy occurs in that office, leaving an unexpired term to be filled by an election for which filings have not been held.

Any ((such)) special three-day filing period shall be fixed by the election officer with whom declarations of candidacy for that office are filed. The election officer shall give notice of the special three-day filing period by notifying the press, radio, and television in the county or counties involved, and by ((such)) any other means as may be required by law.

Candidacies validly filed within the special three-day filing period shall appear on the primary or general election ballot as if filed during the regular filing period.

The procedures for filings for partisan offices where a vacancy occurs under this section or a void in candidacy occurs under RCW 29A.24.140 must be substantially similar to the procedures for nonpartisan offices under RCW 29A.24.150 through 29A.24.170.

NEW SECTION. Sec. 11. A new section is added to chapter 29A.32 RCW to read as follows:

The voters' pamphlet must also contain the political party preference or independent status where a candidate appearing on the ballot has expressed such a preference on his or her declaration of candidacy.

Sec. 12. RCW 29A.36.010 and 2003 c 111 § 901 are each amended to read as follows:

On or before the day following the last day allowed for ((political parties to fill vacancies in the ticket as provided by RCW 29A.28.010)) candidates to withdraw under RCW 29A.24.130, the secretary of state shall certify to each county auditor a list of the candidates who have filed declarations of candidacy in his or her office for the primary. For each office, the certificate shall include the name of each candidate, his or her address, and his or her party ((designation, if any)) preference or independent designation as shown on filed declarations.

Sec. 13. RCW 29A.52.010 and 2003 c 111 § 1301 are each amended to read as follows:

Whenever it shall be necessary to hold a special election in an odd-numbered year to fill an unexpired term of any office which is scheduled to be voted upon for a full term in an even-numbered year, no ((September)) primary election shall be held in the odd-numbered year if, after the last day allowed for candidates to withdraw, ((either of the following circumstances exist:

(1) No more than one candidate of each qualified political party has filed a declaration of candidacy for the same partisan office to be filled; or

(2))) no more than two candidates have filed a declaration of candidacy for a single ((nonpartisan)) office to be filled.

In ((either)) this event, the officer with whom the declarations of candidacy were filed shall immediately notify all candidates concerned and the

names of the candidates that would have been printed upon the ((September)) primary ballot, but for the provisions of this section, shall be printed as ((nominees)) candidates for the positions sought upon the ((November)) general election ballot.

Sec. 14. RCW 29A.80.010 and 2003 c 111 § 2001 are each amended to read as follows:

(((1))) Each political party organization may((:

(a) Make its own)) adopt rules ((and regulations; and

(b) Perform all functions inherent in such an organization.

(2) Only major political parties may designate candidates to appear on the state primary ballot as provided in RCW 29A.28.010)) governing its own organization and the nonstatutory functions of that organization.

Sec. 15. RCW 42.12.040 and 2003 c 238 § 4 are each amended to read as follows:

(1) If a vacancy occurs in any partisan elective office in the executive or legislative branches of state government or in any partisan county elective office before the sixth Tuesday prior to the ((primary for the)) next general election following the occurrence of the vacancy, a successor shall be elected to that office at that general election. Except during the last year of the term of office, if such a vacancy occurs on or after the sixth Tuesday prior to the ((primary for that)) general election, the election of the successor shall occur at the next succeeding general election. The elected successor shall hold office for the remainder of the unexpired term. This section shall not apply to any vacancy occurring in a charter

county ((which)) that has charter provisions inconsistent with this section.

(2) If a vacancy occurs in any legislative office or in any partisan county office after the general election in a year that the position appears on the ballot and before the start of the next term, the term of the successor who is of the same party as the incumbent may commence once he or she has qualified as defined in RCW ((29.01.135)) 29A.04.133 and shall continue through the term for which he or she was elected.

CODIFICATION AND REPEALS

NEW SECTION. Sec. 16. The code reviser shall revise the caption of any section of Title 29A RCW as needed to reflect changes made through this Initiative.

NEW SECTION. Sec. 17. The following acts or parts of acts are each repealed:

(1) RCW 29A.04.157 (September primary) and 2003 c 111 § 128;

(2) RCW 29A.28.010 (Major party ticket) and 2003 c 111 § 701, 1990 c 59 § 102, 1977 ex.s. c 329 § 12, & 1965 c 9 § 29.18.150;

(3) RCW 29A.28.020 (Death or disqualification--Correcting ballots--Counting votes already cast) and 2003 c 111 § 702, 2001 c 46 § 4, & 1977 ex.s. c 329 § 13; and

(4) RCW 29A.36.190 (Partisan candidates qualified for general election) and 2003 c 111 § 919.

NEW SECTION. Sec. 18. This act takes effect only if the Ninth Circuit Court of Appeals' decision in

Democratic Party of Washington State v. Reed, 343 F.3d 1198 (9th Cir. 2003) holding the blanket primary election system in Washington state invalid becomes final and a Final Judgment is entered to that effect.

Supreme Court, U.S.
FILED
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NO. 06-730

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON; ROB MCKENNA, ATTORNEY GENERAL; SAM REED, SECRETARY OF STATE,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; MICHAEL YOUNG; DIANE TEBELIUS; MIKE GASTON; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; J.S. MILLS; WASHINGTON STATE GRANGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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February 6, 2007

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REPLY TO BRIEFS IN OPPOSITION

1. This Case Concerns Core Issues Of State Sovereignty

In response to the State's petition, the Republican, Democratic, and Libertarian Parties have each filed a brief in opposition to the State of Washington's petition for a writ of certiorari in this case.[1] All three of the political party briefs ignore the standards for granting review and proceed to argue the merits of the underlying case. Republican Br. at 12-17 (asserting that the circuit court's decision in this case is consistent with the case law in this Court); Democratic Br. at 10-17 (asserting that the circuit court correctly applied *California Democratic Party v. Jones*, 530 U.S. 567 (2000); Libertarian Br. at 4-10 (asserting, again, that the Ninth Circuit decision is consistent with the *California Democratic* case).

The political parties appear to concede, by their silence on the point, that this case presents a fundamental question concerning state sovereignty: the extent to which a state may structure its process for electing its state officers and its representatives in the United States Congress, including defining the role of political parties in the state election process.

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[1] The Republican and Democratic Parties filed separate briefs in opposition to the State of Washington's petition (No. 06-730) and to the parallel petition of the Washington State Grange (No. 06-713). The Libertarian Party filed a single response to both petitions.

This Court often declines to review lower court decisions unless there is a conflict among the federal circuits or a conflict involving decisions of state courts. However, this Court has often made exception and granted review of decisions involving broad questions of state election policy, such as this case. Indeed, one such important case is directly involved here: *California Democratic Party v. Jones*. This Court granted review of California's 1998 "blanket" primary, which had been upheld by the lower courts. *California Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999). No other circuit court (or highest state court) had ruled inconsistently. Yet this Court recognized the importance of deciding an issue involving both the sovereign policy choices a state may make with respect to its election system and the freedom of speech and association rights of private parties.

Similarly, this Court granted review of a state court decision concerning the constitutionality of term limits for federal officers, without waiting to see if a conflict would development among the lower courts. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). As the Court observed: "The State of Arkansas, by its Attorney General, and the intervenors petitioned for writs of certiorari. *Because of the importance of the issues*, we granted both petitions[.]" *Id.* at 786 (italics added).

A third case in which this Court granted review without a conflict in circuit decisions was *Clingman v. Beaver*, 544 U.S. [illegible]). In

Clingman, the Court reversed a circuit court decision invalidating a feature of Oklahoma's primary nominating system.

This case, like the three cases just cited, involves a state's fundamental options in deciding the essentials of the structure of state government. States as sovereign entities have the prerogative to determine who their officers will be and how those officers will be selected, provided that a state may not impair rights guaranteed by the Constitution of the United States. Although states may not impair the constitutional rights of political parties as private organizations, states have broad authority to determine the role political parties will play in the state election system and in the conduct of state government. As in Clingman, the issue here concerns establishing the boundary between the way political parties prefer to exercise their choices as private organizations and the policies a state might adopt in structuring the public process of electing officers.

In this case, the issue is related to but unresolved by *California Democratic Party* and is at least as important as the term limits issue considered in *Thornton*. Washington's primary election system allows all voters to vote for any candidate and advances the top two candidates to the general election ballot, without regard to party affiliation. The question here is whether this state's choice is constitutionally foreclosed because candidates are permitted to identify their political

party preference, if any, on the primary election ballot. This question implicates core interests of the state—encouraging broad participation in its primary election system and providing relevant information to voters. From the political parties' perspective, it raises important issues of free association. Whether, as the State and the Grange assert, the Ninth Circuit erroneously removed this policy choice from Washington or whether, as the political parties assert, their First Amendment interests foreclose Washington's choice, the importance of the issue justifies granting review.

2. The Constitutional Leeway Of The States To Structure Their Primary Election Systems Is Unsettled, And States Deserve Guidance From This Court

In their briefs, the political parties argue, in effect, that a state may not choose a primary election system that eliminates party nomination as the determinative factor in selecting candidates for the general election ballot if the system allows the candidate to identify the *candidates'* party preference, if any, on the ballot. The political parties erroneously equate the candidate's statement of his or her party preference, if any, with nomination by the party and term such a primary system "partisan". The parties then allege that they are entitled to full control of "their" party nominations. Democratic Br. at 10 ("the state must allow each political party to select its candidates"); Libertarian Br. at 9 ("Once a State opts for a partisan election

system, it must protect the integrity of party labels.") Their arguments, largely supported by the reasoning of the lower court decisions in this case, leave states essentially only two options in setting up their elections systems: (1) allow no ballot information to voters concerning the *candidates'* party preference, or (2) conduct a party nominating primary where voters are limited in the candidates for whom they may vote and where party nomination determines who advances to the general election.

It seems anomalous that states have no other options, since the structuring of a state's election system is a core state function, and *California Democratic Party* suggests otherwise. In Initiative 872, the people of Washington crafted an election system which gives candidates the option of informing voters of the candidates' political preferences, but without surrendering control over the nominating process to the political parties. A state should have the option of designing an election system that reflects the policy choices of the state's voters concerning broad voter participation in each stage of the election process, so long as those policy choices respect the constitutional rights of all citizens. In this case, Washington respects the rights of parties and all other private organizations to decide which candidates to support but divorces this private process from the nomination system.

The lower courts have misconstrued the fundamental nature of the system adopted in Initiative 872 and have failed to give appropriate

deference to a sovereign state's choice in the structuring of its elections. On matters relating to such a core state function, this Court should grant review and clarify the law for Washington and all states.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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February 6, 2007

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(19)

Supreme Court, U.S.
FILED
MAY 23 2007
OFFICE OF THE CLERK

NOS. 06-730, 06-713

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE GRANGE,

Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY, ET AL.,

Respondents.

STATE OF WASHINGTON; ROB MCKENNA, ATTORNEY GENERAL; SAM REED, SECRETARY OF STATE,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX VOLUME I OF III

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Washington State Republican Party v. Washington, 460 F.3d 1108 (9th Cir. 2006) 1a

Washington State Republican Party v. Logan 377 F. Supp. 2d 907 (W.D. Wash. 2005) 35a

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Order Consolidating Appeals (11-08-05) 103a

Order on Attorney's Fees (8-22-06) 106a

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition For Certiorari of the State of Washington, Docket No. 06-713:

Washington State Republican Party v. Washington, 460 F.3d 1108 (9th Cir. 2006) 1a

Washington State Republican Party v. Logan 377 F. Supp. 2d 907 (W.D. Wash. 2005) 35a

Permanent Injunction (7-29-05)..... 93a

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(No. 05-35774) (Appeal of Washington State Grange)

(No. 05-35780) (Appeal of State of Washington)

(NOTE: The dockets for these two appeals are identical except where noted below)

August 4, 2005 Docketed Cause and Entered Appearances of Counsel

August 4, 2005 Civil Appeals Docketing Statement

August 5, 2005 Case rejected from Circuit Mediation Program

August 9, 2005 Appellant's Notice of Designation of Reporter's Transcript

August 11, 2005 Appellees' Response to Motion to Expedite Review (No. 05-35774 only)

August 11, 2005 Appellants' Notice of Designation of Reporter's Transcript (entire transcript ordered)

August 12, 2005 Appellee State Republican Party's Joinder of Opposition to Motion to Expedite Review (No. 05-35774 only)

August 17, 2005 Appellant Washington State Grange's Reply to Response Supporting Motion to Expedite Appeal (No. 05-35774 only)

August 17, 2005 Appellees' Response Opposing Motion to Expedite Review (No. 05-35774 only)

August 18, 2005 Appellants' Joint Reply Supporting Motion to Expedite Review

August 19, 2005 Order Granting in Part and Denying in Part Motion to Expedite Review

August 25, 2005 Appellee Democratic Central Committee's Motion to Extend Time to File Brief

August 31, 2005 Order Granting Democratic Central Committee's Motion to Extend Time

September 19, 2005 Appellant Washington State Grange Opening Brief filed (No. 05-35774)

September 19, 2005 Appellant State of Washington's Opening Brief filed (No. 05-37580)

October 18, 2005 Appellee Washington State Republican Party Brief filed (No. 05-37580)

October 19, 2005 Appellee Washington State Republican Party Brief filed (No. 05-37574)

October 19, 2005 Appellee Libertarian Party of Washington Brief filed

October 26, 2005 Appellee State Democratic Central Committee Brief filed

October 26, 2005 Amicus FairVote's Motion and Brief filed

October 31, 2005 Appellant Washington State Grange's Response Opposing FairVote's Motion for Amicus Status (No. 05-37574)

October 31, 2005 Appellant State of Washington's Response Opposing FairVote's Motion for Amicus Status

October 31, 2005 Appellee Washington State Republican Party's Response Opposing FairVote's Motion for Amicus Status

November 1, 2005 Appellee Washington State Democratic Committee's Joinder in Appellee Republican Party's Response Opposing FairVote's Motion for Amicus Status

November 7, 2005 FairVote's Reply to Responses

November 8, 2005 Order Consolidating Appeals of Washington State Grange and State of Washington, Granting Appellee Washington State Democratic Party's Motion for Extension of Time, and Referring FairVote's Motion to the Merits Panel

November 8, 2005 Appellee Washington State Democratic Committee's Brief

November 8, 2005 Appellant Washington State Grange's Reply Brief

November 8, 2005 Appellant State of Washington's Reply Brief

December 21, 2005 Argument Calendared for Feb. 6. 2006

January 10, 2006 FairVote's Additional Brief

February 6, 2006 Argued and Submitted to Dorothy W. NELSON, Pamela A. RYMER, and Raymond C. FISHER

August 22, 2006 Order Granting Leave to FairVote to File Amicus Brief

August 22, 2006 Order on Merits Affirming U. S. District Court

September 13, 2006 Mandate Issued and Costs Taxed

October 3, 2006 Agreed Order on Attorneys' Fees

November 27, 2006 Notice from Supreme Court: Washington State Grange Petition for Certiorari Filed on 11/20/06

December 1, 2006 Notice from Supreme Court: State of Washington Petition for Certiorari Filed on 11/20/06

March 1, 2007 Notice from Supreme Court: Petitions for Certiorari Granted on 2/26/07

UNITED DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

(No. 2:05-cv-00927-TSZ)

May 19, 2005 Complaint for Declaratory Judgment and for Injunctive Relief Regarding

Initiative 872 and Primary Elections [Doc. #1]

May 19, 2005 Motion to Intervene by Intervenor Plaintiffs Washington State Democratic Central Committee [Doc. #2]

May 19, 2005 Motion to Intervene by Intervenor Plaintiffs Libertarian Party of Washington State [Doc. #3]

May 26, 2005 Motion for Preliminary Injunction by Plaintiff Washington State Republican Party [Doc. #7]

May 26, 2005 Declaration of John J. White, Jr. re Motion for Preliminary Injunction [Doc. #8]

May 27, 2005 Minute Order by Judge Thomas S. Zilly scheduling status conference [Doc #11]

June 2, 2005 Motion to Intervene of State of Washington, Rob McKenna, and Sam Reed [Doc. #22]

June 2, 2005 Answer of State of Washington Intervenor Defendants [Doc. #23]

June 7, 2005 Complaint of Intervenor Plaintiff Libertarian Party of Washington State [Doc. #28]

June 7, 2005 Order Granting Motion to Intervene of Democratic Central Committee [Doc. #29]

June 7, 2005 Order Granting Motion to Intervene of State of Washington et al. [Doc. #30]

June 7, 2005 Minute Entry re: Status Conference held on 6/7/05; Granting Motions to Intervene by State of Washington, Democratic Central Committee, Libertarian Party, and Washington State Grange; Adopting Briefing Schedule; Requesting Joint Statement of Issues; Continuing Motion for Preliminary Injunction [Doc. #45]

June 8, 2005 Order Granting Motion to Intervene of Libertarian Party [Doc. #27]

June 8, 2005 Complaint of Intervenor Plaintiff Democratic Central Committee [Doc. #31]

June 8, 2005 Request of Washington State Grange for Entry of Order Granting Intervention [Doc. #33]

June 10, 2005 Answer of Intervenor Defendant Washington State Grange [Doc. #37]

June 10, 2005 Attachments to Answer of Intervenor Defendant Washington State Grange [Doc. #38]

June 10, 2005 Stipulation Statement of Legal Issues [Doc. #40]

June 14, 2005 Order Regarding Initial Disclosures, Joint Status Report and Early Settlement [Doc. #44]

June 15, 2005 Answer of Defendant Donna M. Eldridge, Jefferson County Auditor [Doc. #47]

caucuses and conventions adopted by the Republican State Committee of Washington.

Rule 9 Demonstration of Significant Support: Legislative Districts. A candidate for Washington state legislature demonstrates significant Republican support by obtaining the vote of 25% or more of the delegates to county conventions from precincts within the Legislative District. Votes shall be tallied at each county convention (or, if provided for by the rules of the county, at legislative district caucuses called by the respective county), such nominating conventions or caucuses held not earlier than the first day of April and not later than the last date set for the holding of county conventions in accordance with the rules for caucuses and conventions adopted by the Republican State Committee of Washington. The results from each county shall be reported to the Secretary, the Republican State Committee of Washington, within three days after the convention has adjourned.

Rule 10. Demonstration of Significant Support: County Districted Offices. A candidate for a county partisan office comprising less than the entire county (County Council and County Commissioners who are nominated by less than the entire county demonstrates significant Republican support by obtaining the vote of 25% or more of the delegates to a Republican county nominating convention from precincts within the district the candidate seeks to represent, such nominating conventions (or district caucus if provided for under the rules of the county) shall be held not earlier than the first day of April and not later than the last date set for the holding of county conventions in

accordance with the rules for caucuses and conventions adopted by the Republican State Committee of Washington.

Rule 11: Provision When No Candidate Demonstrates Significant Support. If no candidate demonstrates the requisite support level, then the three candidates receiving the most votes shall be certified to the primary ballot.

Rule 12. Partisan elections in Odd-Numbered Years. Counties holding partisan elections in odd-numbered years shall hold precinct caucuses on the second Tuesday of March and shall thereafter hold district and/or county nominating conventions pursuant to the foregoing rules and to the rules of procedure for conducting precinct caucuses and county conventions adopted by the Republican State Committee to govern the preceding even-numbered year.

Rule 13. Special Elections: County or Legislative Offices. In any special election called to complete an unfilled term of office, the Republican nominating convention shall consist of the Precinct Committee Officers elected or appointed at least sixty days before the holding of the convention. The convention shall be held not later than the Sunday before filing for office commences. Candidates demonstrate significant support by obtaining the vote of 25% or more of the delegates to the convention.

Rule 14. Special Elections, Statewide Office. In any special election called to complete an unfilled term of office for any statewide office, if the notice of special election is called more than sixty

days prior to the holding of a regularly scheduled state Republican convention, said convention shall serve as the nominating convention. In all other cases, the Republican State Committee shall serve as the Republican nominating convention. Each state committeeman, state committeewoman and county chairman shall be entitled to cast as many votes as the county he or she represents was allocated at the last Republican state convention. Candidates demonstrate significant support by obtaining the vote of 25% or more of the votes cast.

Rule 15. Alternative Demonstration of Support by Petition. Alternatively, if the state of Washington shall have established a system of voter registration in which voters may register as a member of the Republican Party and shall have provided for a system of validating nominating petitions, in any race where an incumbent has not received more than 66% of the vote in a nominating convention, a candidate may demonstrate significant Republican support by filing, with the declaration of candidacy a Nominating Petition signed by 5% of the Registered Republicans in the constituency that the candidate seeks to represent.

In the absence of a system of party registration and of petition signature validation, a candidate may demonstrate significant Republican support by filing, not less than one week before the close of filing for office, a Nominating Petition signed by 5% of the Republican Vote in the constituency in the last Quadrennial Election. "Republican Vote" shall mean the total vote in the precincts within the constituency for the offices of President, Vice President, Attorney General and the two positions of

the State House of Representative, divided by five. The Petition shall be filed with the County Central Committee for all offices where filing for office is with the County Auditor and with the State committee for all offices where the filing for office is with the Secretary of State. The Nominating Petition shall be in a form prescribed by the State Chairman and shall include a statement that the individual considers him/herself to be a Republican and will not participate in the caucus system nor sign a nominating petition for any other party during the current year, and that the signer understands that the nominating petition shall be filed with the Republican Party and may be publicly inspected. The Party Committee with which the petition is filed shall have the responsibility of validating the signatures and certifying that the candidate has demonstrated significant Republican support.

PART THREE: Nomination in the Absence of a Valid Primary.

[NOTE: This set of rules is designed to provide for nomination of Republican candidates in the event that the court does not impose a party primary. If the "winnowing election" established by Initiate 872 remains in effect, actions under this rule will determine which Republican would appear on the "qualifying election" ballot in September.]

Rule 16. Nomination in the Absence of qualifying Primary. In the absence of a primary election complying with Rule 1, Republican Party nominees will be selected in accordance with this Part Three.

Rule 17. Nominating Convention for years commencing in the Year 2005. Beginning in the year 2005, for any regularly scheduled election the candidates of the Republican Party shall be nominated by convention convened pursuant to these rules.

Such nominating convention shall select the party's nominee and shall be held not later than the Saturday preceding the first day candidates may file for election.

Delegates eligible to vote in the convention, or as appropriate in the caucus, shall be delegates residing in the district or constituency which the elected official shall represent. In Code Counties, candidates for county commissioner shall be nominated by delegates residing in the district which the commissioner seeks to represent.

Rule 18 Nominating by Precinct Committee Officers for special elections.[1]

In the event of any special election in an odd-numbered year as a result of a vacancy due to death or resignation the Republican nominating convention shall consist of the Precinct Committee Officers

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[1] Where the vacancy in office results from the resignation of a Republican elected official two separate actions are required by the Republican Party. Operating under the state constitution and other provisions, the party must submit a list of three names from which the County Commissioners must make the choice of a person to fill the office until the next election. Under these rules, the Party nominates its candidate to run at the next election. While they may be the same individual, they need not be. The two separate actions could be conducted at one meeting, depending on timing.

elected or appointed at least sixty days before the holding of the convention. In any even-numbered year in which the vacancy occurs not later than 15 days before the regularly scheduled county or state convention, the convention shall nominate. If the vacancy occurs subsequent to that date, the nominating convention shall consist of the Precinct Committee Officers elected or appointed at least sixty days before the holding of the convention. Said convention shall be held not later than the Saturday preceding the first day candidates may file for election. Provided, that in the event of a vacancy occurring subsequent to July 15 of any year, the state committee shall serve as the nominating convention, or in the case of offices voted on solely by voters on one county, the county central committee of that county.

Rule 19. Nominating Conventions in Odd-Numbered Years [King and Snohomish in 2005]. For nomination for any regularly scheduled office for county commission or county council, other county office or any other partisan office, the chairman of the Republican County Central Committee shall cause a nominating convention to be convened.

The county chairman of the county involved shall convene precinct caucuses to select delegates to the nominating convention. The caucuses shall be conducted, insofar as possible, in accordance with the Rules Governing County Caucuses adopted by the Republican State Committee of Washington to govern in the prior even-numbered year, provided that the date for the precinct caucus shall be set by the county central committee.

Rule 20. Nominating Conventions in even-numbered years. For regularly scheduled elections to be held in any even-numbered year commencing with the year 2006, any nominating convention shall be the county or state convention called pursuant to the Rules for Precinct Caucuses and County Conventions adopted by the Republican State Committee of Washington.

Rule 21. Majority Vote Required. The nominee of the Republican Party shall be the candidate who receives a majority vote. If no candidate receives a majority of the first ballot, the candidate receiving the least number of votes shall be dropped from each successive ballot until a candidate receives a majority. In the event of a tie in determining which candidate shall be dropped, the candidate shall be chosen by lot.

PART FOUR General Rules.

The following rules shall apply to conventions held under either Part Two or Part Three of these rules.

Rule 22. Rules for Balloting. Each candidate or the candidate's representative shall be entitled to address the caucus or convention for not less than two minutes, or longer if provided for under rules adopted to govern the convention. Each delegate shall vote by ballot for one candidate for each office for which nominations are sought. The results shall be tallied and reported to the chairman of the convention and, within three days after the adjournment of the convention, to the Secretary of the Republican State Committee of Washington. The convention or caucus may dispense with balloting for

any office in which a single candidate is seeking nomination.

Rule 23. Weighting votes in Multi-County Districts. The standard minimum allocation of delegates to precincts under existing state rules for precinct caucuses is two delegates per precinct on average (see rules for caucuses and conventions adopted by the Republican State Committee of Washington). Some counties elect to allocate more delegates in order to increase participation at the grass roots level. In order to assure appropriate weighting between delegate votes in multi-county Legislative or Congressional districts, the delegate vote reported under Rules 7 and 9 for multi-county districts shall be adjusted as follows: Multiply by two and divide by the average number of delegates allocated to each precinct in allocation of delegates.

> Example: Smith County and Jones County make up the 50th Legislative District and each are identical in population. Smith County has allocated an average of 2 delegates per precinct to its precincts for purposes of the nominating convention. Jones County has allocated an average of 4 delegates per precinct. The vote tally in Smith County is 120 votes for candidate A and 30 for Candidates B. The vote tally in Jones county is 212 votes for Candidate A and 88 votes for Candidate B. While the "raw vote" would give Candidate B 118 votes out of 450, or over 25%, that is a result of the larger allocation of votes in Jones County. Adjusting by the formula, the raw votes in Smith County would remain the same (multiplied by 2 and divided by 2),

but the votes in Jones County would be divided in half (multiplied by 2 and divided by 4). The result would be that Candidate A has 226 votes and Candidate B has 74. Since 74 is less than 25% of 300, Candidate B would not be certified for the primary ballot in a convention held under Part Two. (In this example, of course, Candidate A would have a majority and would be the nominee in a convention held under Part Three.)

Rule 24 Provision for Convention Recess. If a convention determines that it is not prepared to nominate or certify a candidate or candidates for one or more offices, the convention may recess to a date certain, not later than the Saturday before the commencement of the period for candidate filing, or may recess to a call of the chair. In the event the convention recesses to the call of the chair, any reconvened convention must be held not later than the Saturday before the commencement of the period for candidate filing and the call of the reconvened notice must be mailed not later than ten days before the date upon which the convention reconvenes.

Rule 25: Provision for Reconvening Convention. In the event of a vacancy on the Republican ballot or a substantial change in the nature of the primary by virtue of the death, disability, or announced withdrawal or resignation of a candidate, the county chairman (in the case of an office wholly within the boundary of a single county) or the state chairman (in the case of a multi county legislative office) may convene the members of the county central committee or committees residing within the relevant jurisdiction, shall convene to

serve as the convention. In the event the vacancy involves a Congressional or statewide office, the state Committee shall serve as the default nominating convention. Each state committeeman, state committeewoman and county chairman shall be entitled to cast as many votes as the county he or she represents was allocated at the last Republican state convention.

Rule 26: Authority to Fill Ballot Vacancies. Should a place on the ticket of the Republican Party be vacant because no person has filed for nomination as the candidate of that major political party, (whether or not a candidate has been certified pursuant to these rules) and if the vacancy is for a state or county office to be voted on solely by the electors of a single county the county central committee may select and certify a candidate to fill the vacancy; if the vacancy is for any other office the state committee may select and certify a candidate to fill the vacancy.

Rule 27 Certification. For offices voted on solely by voters from one county, The chairman of the county central committee shall certify the results to the County Auditor, or other official serving as chief elections officer for the county no later than the first day for filing for office .For offices voted on by voters from more than one county, the chairman of the Republican State Committee of Washington shall certify the results to the Secretary of State no later than the first day for filing for office.

Rule 28. Action in Default of County Convention. In the event that any county shall fail to hold a nominating convention pursuant to these

rules, the responsibility for selecting the nominee of the Republican Party shall be that of the Republican State Committee of Washington.

Rule 29 Convention Contests. In the event that the results of any convention held under these rules shall be challenged, the Republican State Committee of Washington shall be the sole judge of such contest and the determination of the Republication State Committee of Washington as to whom the nominee of the Republican Party is shall be final.

Rule 30 Authority to Use Name Republican. Only candidates who shall have been certified or nominated pursuant to these rules shall be entitled to designate themselves as Republican candidates or to appear on the election ballot or in other election documents using the designation "Republican" or other words identifying themselves as Republicans

PART FIVE : Authority of State Committee and Executive Board.

Rule 31 Authority to Amend Rules. In the event of the rendering of any court decision which affects the conduct of nominations, the state committee shall reserve the right to amend these rules to conform to, or take advantage of, such court decision. In the interval between state committee meetings, such power is held by the Executive Board.

EXHIBIT 8

[letterhead omitted]

May 17, 2005

John J. White, Jr.
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RE: Nomination of Republican Candidates in 2005

Dear Mr. White:

This is in response to your letter of April 19, 2005 in which you asserted an expectation on the part of the Republican State Committee that Spokane County "respect the Republican Party's selection of its nominee" for partisan offices that will appear on the 2005 primary ballot. As you indicate in your letter, details of the implementation of Initiative 872 – or the Top Two Primary – are not yet formally established, so I may be unable to answer your questions completely at this time.

From communications with the Office of the Secretary of State, it is my understanding that Secretary Reed is in the process of promulgating administrative rules implementing the initiative. Further, it is my understanding that the language in the initiative is interpreted by the State as repealing the existing Montana-style primary and the State intends to administer the 2005 primary under the language adopted in the initiative.

The Spokane County Auditor's Office will be guided by the text of the initiative and the administrative rules adopted by the Secretary of State in making

determinations regarding placement of candidates' names on the 2005 primary ballot. I appreciate you providing my office with a copy of the "Rules for the Nomination of Republican Candidates". We will keep your rules on file as a reference in the event they are germane to the implementation of the new primary. At this time, I am not aware of any language associated with the Initiative that contemplates a partisan nomination process separate from the primary.

I hope this information is of use to you. If you have additional questions feel free to contact me.

Sincerely,

Vicky M. Dalton

Vicky M. Dalton, CPA
Auditor

cc: Hon. Sam Reed, Secretary of State

Nick Handy, State Elections Director, Office of the Secretary of State

Steven Kinn, Deputy Prosecuting Attorney, Spokane County

[letterhead omitted]

May 16, 2005

John J. White, Jr.
Livengood, Fitzgerald & Alskog, PLLC
121 Third Avenue
Post Office Box 908
Kirkland, WA 98083-0908

RE: Nomination of Republican Candidates in 2005

Dear Mr. White:

This responds to your letter of April 19, 2005 in which you asserted an expectation on the part of the Republican State Committee that Clark County will "respect the Republican Party's selection of its nominee" for partisan offices that will appear on the 2005 primary ballot. As you indicate in your letter, details for the implementation of Initiative 872 – or the Top Two Primary – are not yet formally established, so I may be unable to answer your questions completely at this time.

I have been in contact with the office of the Secretary of State and it is my understanding that Secretary Reed is in the process of promulgating administrative rules implementing the Initiative. Further, it is my understanding that the language in the initiative is interpreted by the state as repealing the existing Montana-style primary and the state intends to administer the 2005 primary under the language adopted in the Initiative.

Clark County Elections will be guided by the text of the initiative and the administrative rules adopted by the Secretary of State in making determinations

regarding placement of candidates' names on the 2005 primary ballot. I appreciate you providing my office with a copy of the "Rules for the Nomination of Republican Candidates". We will keep your rules on file as a reference in the event they are germane to the implementation of the new primary. At this time, I am not aware of any language associated with the Initiative that contemplates a partisan nomination process separate from the primary.

I hope this information is of use to you. I have copied the Secretary of State on my reply so that his office can provide notice to you and your client when administrative rules are filed and adopted.

Sincerely,

Greg Kimsey

Greg Kimsey
Clark County Auditor

cc: Hon. Sam Reed, Secretary of State

Nick Handy, State Elections Director, Office of the Secretary of State

Curt Wyrick Chief. Deputy Prosecuting Attorney, Office of the Clark County Prosecuting Attorney

[letterhead omitted]

May 13, 2005

John J. White, Jr.
Livengood, Fitzgerald & Alskog, PLLC
121 Third Avenue
Post Office Box 908
Kirkland, WA 98083-0908

RE: Nomination of Republican Candidates in 2005

Dear Mr. White:

This responds to your letter of May 6, 2005 in which you asserted an expectation on the part of the Republican State Committee that Snohomish County "respect the Republican Party's selection of its nominee" for partisan offices that will appear on the 2005 primary ballot. As you indicate in your letter, details of the implementation of Initiative 872 – or the Top Two Primary – are not yet formally established, so I may be unable to answer your questions completely at this time.

I have been in contact with the office of the Secretary of State and it is my understanding that Secretary Reed is in process of promulgating administrative rules implementing the Initiative. Further, it is my understanding that the language in the initiative is interpreted by the state as repealing the existing Montana-style primary and the state intends to administer the 2005 primary under the language adopted in the Initiative.

The Snohomish County Auditor's office will be guided by the text of the initiative and the administrative rules adopted by the Secretary of

State in making determinations regarding placement of candidates' names on the 2005 primary ballot. I appreciate you providing my office with a copy of the "Rules for the Nomination of Republican Candidates". We will keep your rules on file as a reference in the event they are germane to the implementation of the new primary. At this time, I am not aware of any language associated with the Initiative that contemplates a partisan nomination process separate from the primary.

I hope this information is of use to you. I have copied the Secretary of State on my reply so that his office can provide notice to you and your client when administrative rules are filed and adopted. As further information becomes available regarding the implementation of this new primary in Snohomish County, I will make every effort to keep you informed.

Sincerely,

Bob Terwilliger

Bob Terwilliger
Snohomish County Auditor

cc: Hon. Sam Reed, Secretary of State

Nick Handy, State Elections Director, Office of the Secretary of State

Gordon Sivley, Deputy Prosecuting Attorney, Snohomish County Prosecutor's Office

[letterhead omitted]

April 27, 2005

John J. White, Jr.
Livengood, Fitzgerald & Alskog, PLLC
121 Third Avenue
Post Office Box 908
Kirkland, WA 98083-0908

RE: Nomination of Republican Candidates in 2005

Dear Mr. White:

This responds to your letter of April 19, 2005 in which you asserted an expectation on the part of the Republican State Committee that King County "respect the Republican Party's selection of its nominee" for partisan offices that will appear on the 2005 primary ballot. As you indicate in your letter, details of the implementation of Initiative 872 – or the Top Two Primary – are not yet formally established, so I may be unable to answer your questions completely at this time.

I have been in contact with the office of the Secretary of State and it is my understanding that Secretary Reed is in the process of promulgating administrative rules implementing the Initiative. Further, it is my understanding that the language in the Initiative is interpreted by the state as repealing the existing Montana-style primary, and the state intends to administer the 2005 primary under the language adopted in the initiative.

King County Elections will be guided by the text of the Initiative and the administrative rules adopted by the Secretary of State in making determinations

regarding placement of candidates' names on the 2005 primary ballot. I appreciate your providing my office with a copy of the "Rules for the Nomination of Republican Candidates." We will keep your rules on file as a reference in the event they are germane to the implementation of the new primary. At this time, I am not aware of any language associated with the Initiative that contemplates a partisan nomination process separate from the primary.

I hope this information is of use to you. I have copied the Secretary of State on my reply so that his office can provide notice to you and your client when administrative rules are filed and adopted. As further information becomes available regarding the implementation of this new primary in King County, I will make every effort to keep you informed.

Sincerely,

Dean C. Logan

Dean C. Logan

Director

cc: Hon. Sam Reed, Secretary of State

Nick Handy, State Elections Director, Office of the Secretary of State

Janine Joly, Sr. Deputy Prosecuting Attorney, Office of the King County Prosecutor

EXHIBIT 9

Washington Secretary of State

Elections Calendar

1/1/2005	LEGAL HOLIDAY – NEW YEAR'S DAY (RCW 1.16.050)
1/8/2005	Last day to register to vote for the February 8 special election except for in-person registration at the auditor"s office (RCW 29A.08.140)(RCW 29A.08.145)
1/10/2005	First day to file Initiatives to the People (RCW 29A.72.030)
1/10/2005	Regular Legislative Session begins (44.04.010)
1/17/2005	LEGAL HOLIDAY – MARTIN LUTHER KING, JR. DAY (RCW 1.16.050)
1/18/2005	PDC Form C-4
1/19/2005	Auditors to have absentee ballots available for the February 8 special election (RCW 29A.40.070)
1/21/2005	Auditors to have absentee ballots mailed for the February 8 special election (RCW 29A.40.070)
1/21/2005	Last day for filing resolutions for the March 8 special election (RCW 29A04.330)
1/24/2005	Last day for in-person registration at the auditor"s office for the February 8 special election (RCW 29A.08.145)

1/24/2005	Last week for auditors to publish notice of closing of registration for the March 8 special election (RCW 29A.08.140)
1/26/2005	First day to apply for an absentee ballot for the April 26 special election (RCW 29A.40.020)(RCW 29A.40.050)
1/27/2005	Last day for adoption of resolutions for a local voters pamphlet for the March 8 special election (RCW 29A.32.210)
1/29/2005	First day auditors may publish notice of the February 8 special election (RCW 29A.52.351)
2/1/2005	PDC Form C-4
2/5/2005	Last day to register to vote for the March 8 special election except for in-person registration at the auditor's office (RCW 29A.08.140)(RCW 29A.08.145)
2/5/2005	Last day auditors may publish notice of the February 8 special election (RCW 29A.52.351)
2/7/2005	Last day to apply for an absentee ballot for the February 8 special election (RCW 29A.40.020)
2/8/2005	SPECIAL ELECTION (RCW 29A04.321)(RCW 29A.04.330)
2/15/2005	PDC Form C-4
2/16/2005	Auditors to have absentee ballots available for the March 8 special election (RCW 29A.40.070)

2/16/2005	First day to apply for an absentee ballot for the May 17 special election (RCW 29A.40.020)(RCW 29A.40.050)
2/18/2005	County canvassing board to certify the February 8 special election returns (RCW 29A.60.190)
2/18/2005	Last day for in-person registration at the auditor's office for the March 8 special election (RCW 29A.08.145)
2/18/2005	Auditors to have absentee ballots mailed for the March 8 special election (RCW 29A.40.070)
2/21/2005	LEGAL HOLIDAY – PRESIDENTS' DAY (RCW 1.16.050)
2/26/2005	First day auditors may publish notice of the March 8 special election (RCW 29A.52.351)
3/1/2005	PDC Form C-4
3/5/2005	Last day auditors may publish notice of the March 8 special election (RCW 29A.52.351)
3/7/2005	Last day to apply for an absentee ballot for the March 8 special election (RCW 29A.40.020)
3/8/2005	SPECIAL ELECTION (RCW 29A.04.330)
3/9/2005	First day to file Initiatives to the legislature (RCW 29A.72.030)
3/10/2005	PDC Form C-4

3/11/2005	Last day for filing resolutions for the April 26 special election (RCW 29A.04.330)
3/14/2005	Last week for auditors to publish notice of closing of registration for the April 26 special election (RCW 29A.08.140)
3/17/2005	Last day for adoption of resolutions for a local voters pamphlet for the April 26 special election (RCW 29A.32.210)
3/18/2005	County canvassing board to certify the March 8 special election returns (RCW 29A.60.190)
3/26/2005	Last day to register to vote for the April 26 special election except for in-person registration at the auditor's office (RCW 29A.08.140)(RCW 29A.08.145)
4/1/2005	Last day for filing resolutions for the May 17 special election (RCW 29A.04.330)
4/4/2005	Last week for auditors to publish notice of closing of registration for the May 17 special election (RCW 29A.08.140)
4/5/2005	PDC Form C-4
4/6/2005	Auditors to have absentee ballots available for the April 26 special election (RCW 29A.40.070)
4/7/2005	Last day for adoption of resolutions for a local voters pamphlet for the May 17 special election (RCW 29A.32.210)

4/8/2005	Auditors to have absentee ballots mailed for the April 26 special election (RCW 29A.40.070)
4/11/2005	Last day for in-person registration at the auditor's office for the April 26 special election (RCW 29A.08.145)
4/11/2005	PDC Form C-4
4/16/2005	Last day to resister to vote for the May 17 special election except for in-person registration at the auditor's office (RCW 29A.08.140)(RCW 29A.08.145)
4/16/2005	First day auditors may publish notice of the April 26 special election (RCW 29A.52.351)
4/19/2005	PDC Form C-4
4/23/2005	Last day auditors may publish notice of the April 26 special election (RCW 29A.52.351)
4/24/2005	Regular Legislative Session ends (Article II. Section 12, Washington State Constitution)
4/25/2005	Last day to apply for an absentee ballot for the April 26 special election (RCW 29A.40.20)
4/26/2005	SPECIAL ELECTION (RCW 29A.04.321)(RCW 29A.04.330)
4/26/2005	PDC Form C-4
4/27/2005	Auditors to have absentee ballots available for the May 17 special election (RCW 29A.40.070)

4/29/2005	Auditors to have absentee ballots mailed for the May 17 special election (RCW 29A.40.070)
5/2/2005	Last day for in-person registration at the auditor's office for the May 17 special election (RCW 29A.08.145)
5/6/2005	County canvassing board to certify the April 26 special election returns (RCW 29A.60.160)
5/7/2005	First day auditors may publish notice of the May 17 special election (RCW 29A.52.351)
5/10/2005	PDC Form C-4
5/14/2005	Last day auditors may publish notice of the May 17 special election (RCW 29A.52.351)
5/16/2005	Last day to apply for an absentee ballot for the May 17 special election (RCW 29A.40.020)
5/17/2005	SPECIAL ELECTION (RCW 29A.04.330)
5/27/2005	County canvassing board to certify the May 17 special election returns (RCW 29A.60.160)
5/30/2005	LEGAL HOLIDAY – MEMORIAL DAY (RCW 1.16.050)
6/10/2005	PDC Form C-4
6/22/2005	Last day for adoption of resolutions for a local voters pamphlet for the primary (RCW 29A.32.210)

6/22/2005	First day to apply for an absentee ballot for the primary (RCW 29A.40.020)(RCW 29A.40.050)
6/24/2005	Last day for filing officer to assign position numbers for election purposes (RCW 29A.24.010)
7/4/2005	LEGAL HOLIDAY – INDEPENDENCE DAY (RCW 1.16.050)
7/8/2005	Last day to file signatures for Initiatives to the People (RCW 29A.72.030)
7/11/2005	First day candidate filings by mail may be accepted (RCW 29A.24.081)
7/25/2005	First day for all candidates to file for office (RCW 29A.24.050)
7/29/2005	Last day for all candidates to file for office (RCW 29A.24.050)
8/4/2005	Last day for candidates to withdraw (RCW 29A.24.131)
8/5/2005	Last day for filing resolutions for special elections held in conjunction with the primary (RCW 29A.04.330)
8/5/2005	Last day for major parties to fill vacancies (RCW 29A.28.011)
8/8/2005	Last day void in candidacy or vacancy in non-partisan office will cause filings to be reopened for a three-day filing period. The names to appear on the primary ballot (RCW 29A.24.171)

8/8/2005	Last day vacancy in partisan office will cause an unexpired term election (RCW 29A.24.211)
8/8/2005	Last day for Secretary of State to certify candidates to auditors (RCW 29A.36.011)
8/8/2005	Last week for auditors to publish notice of closing of registration for the primary (RCW 29A.08.140)
8/9/2005	First day void in candidacy or vacancy in non-partisan office (other than Superintendent of Public Instruction or Judge of the Supreme Court) will cause filings to be reopened for a three-day filing period. The names to appear only on the general election ballot (RCW 29A.24.181)
8/10/2005	Last day for adoption of resolutions for a local voters pamphlet for the general election (RCW 29A.32.210)
8/10/2005	First day to apply for a general election absentee ballot (RCW 29A.40.020)(RCW 29A.40.050)
8/20/2005	Last day to register to vote in the state primary except for in-person registration at the auditor's office (RCW 29A.08.140)(RCW 29A.08.145)
8/30/2005	PDC Form C-4
8/31/2005	Auditors to have absentee ballots available for the primary (RCW 29A.40.070)

9/2/2005	Auditors to have absentee ballots mailed for the primary (RCW 29A.40.070)
9/2/2005	Last day for in-person registration at the auditor's office for the primary (RCW 29A.08.145)
9/5/2005	LEGAL HOLIDAY – LABOR DAY (RCW 1.16.050)
9/10/2005	First day auditors may publish notice of the primary (RCW 29A.52.311)
9/13/2005	PDC Form C-4
9/17/2005	Last day auditors may publish notice of the primary (RCW 29A.52.311)
9/19/2005	Last day for write-in candidates to file Declaration of Candidacy for the primary (RCW 29A.24.311)
9/19/2005	Last day to apply for an absentee ballot for the primary (RCW 29A.40.020)
9/20/2005	STATE PRIMARY (RCW 29A.04.311)(RCW 29A.04.330)
9/23/2005	Last day for filing resolutions for a special election to be held in conjunction with the general election (RCW 29A.04.330)
9/26/2005	Last week for auditors to publish notice of closing of registration for the general election (RCW 29A.08.140)
9/26/2005	Last day void in candidacy or vacancy in a non-partisan office (other than Superintendent of Public Instruction or

judge of the Supreme Court) will cause filings to be re-opened for a three-day filing period. The names to appear only on the general election ballot (RCW 29A.24.181)

9/30/2005 County canvassing board to certify the primary returns (RCW 29A.60.190)

10/3/2005 Last day for auditors to transmit abstract of primary votes to the Secretary of State (RCW 29A.60.230)

10/8/2005 Last day to register to vote in the general election except for in-person registration at the auditor's office (RCW 29A.08.140)(RCW 29A.08.145)

10/10/2005 PDC Form C-4

10/11/2005 Last day for Secretary of State to certify the primary returns (RCW 29A.60.240)

10/12/2005 Last day for Secretary of State to certify nominees and state measures to auditors (RCW 29A.52.321)

10/18/2005 PDC Form C-4

10/19/2005 Auditors to have absentee ballots available for the state general election (RCW 29A.40.070)

10/21/2005 Auditors to have absentee ballots mailed for the state general election (29A.40.070)

10/24/2005 Last day for in-person registration at the auditor's office for the general election (RCW 29A.08.145)

10/29/2005	First day auditors may publish notice of the general election (RCW 29A.52.350)
11/1/2005	PDC Form C-4
11/5/2005	Last day auditors may publish notice of the general election (RCW 29A.52.351)
11/7/2005	Last day for write-in candidates to file a Declaration of Candidacy (RCW 29A.24.311)
11/7/2005	Last day to apply for an absentee ballot for the general election (RCW 29A.40.020)
11/8/2005	STATE GENERAL ELECTION (RCW 29A.04.321)(RCW 29A.04.330)
11/11/2005	LEGAL HOLIDAY – VETERANS' DAY (RCW 1.16.050)
11/23/2005	County canvassing boards to certify the general election returns (RCW 29A.60.190)
11/24/2005	LEGAL HOLIDAY – THANKSGIVING DAY (RCW 1.16.050)
11/25/2005	STATE OBSERVED HOLIDAY (RCW 1.16.050)
11/28/2005	Last day for auditors to transmit abstract of general election votes to Secretary of State (RCW 29A.60.230)
12/8/2005	Last day for Secretary of State to certify the state general election returns (RCW 29A.60.250)

12/8/2005	State measures receiving favorable majority vote are declared law by governor unless effective date is contained within test of measure (RCW 29A.60.260)
12/10/2005	PDC Form C-4
12/23/2005	Last day to file resolutions for the February 7, 2006 special election (RCW 29A.04.330)
12/25/2005	LEGAL HOLIDAY – CHRISTMAS DAY (RCW 1.16.050)
12/26/2005	STATE OBSERVED HOLIDAY (RCW 1.16.050)
12/29/2005	LAST DAY FOR ADOPTION OF RESOLUTIONS FOR A LOCAL VOTERS PAMPHLET FOR THE February 7 special election (RCW 29A.32.210)
12/30/2005	Last day to file signatures for Initiatives to the legislature (RCW 29A.72.030)

You can find this information at: http://www.secstate.wa.gov/elections/calendar_list.aspx

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, CHRISTOPHER VANCE, BERTABELLE HUBKA, STEVE NEIGHBORS, BRENT BOGER, MARCY COLLINS, MICHAEL YOUNG,

Plaintiffs,

v.

DEAN LOGAN, King County Records & Elections Division Manager; BOB TERWILLIGER, Snohomish County Auditor; VICKY DALTON, Spokane County Auditor, GREG KIMSEY, Clark County Auditor, CHRISTINA SWANSON, Cowlitz County Auditor, VERN SPATZ, Grays Harbor County Auditor, PAT GARDNER, Pacific County Auditor, DIANE L. TISCHER, Wahkiakum County Auditor, and DONNA M. ELDRIDGE, Jefferson County Auditor,

Defendants.

NO. 05-0927-Z

ANSWER OF STATE OF WASHINGTON INTERVENORS

I. NATURE OF ACTION

1. Paragraph 1 of the Complaint purports to be a paraphrase and summary of the

constitutional rights of political parties, including a quote from case law. This paragraph amounts to legal argument and does not require an answer. To the extent an answer is appropriate, the State denies that Paragraph 1 is an accurate summary of the law. The quote is accurate but misleading when removed from its context.

2. Paragraph 2 of the Complaint consists of legal argument concerning the "fundamental purposes of the First Amendment" and does not require an answer. To the extent an answer is appropriate, the State asserts that Paragraph 2 is irrelevant to this case, as Washington law does not implicate the principles there advanced.

3. Responding to Paragraph 3 of the Complaint, the State admits that Initiative Measure No. 872 (I-872) was enacted through voter approval of an initiative measure, and took effect on or about December 2, 2004. The remainder of Paragraph 3 consists of legal argument concerning the legal effect of Washington state law. To the extent an answer is required, the State denies that Paragraph 3 accurately states the law.

4. Paragraph 4 of the Complaint consists of speculation concerning the intent behind the adoption of Initiative 872 and argument concerning its legal effect. To the extent an answer is required, the State denies that Paragraph 4 accurately characterizes the intent of the initiative measure or its effect on political parties.

5. Responding to Paragraph 5 of the Complaint, the State understands that the Plaintiffs have filed this action to protect what the Plaintiffs

assert to be First Amendment rights. The State denies that Initiative 872 censors or interferes with the rights of the plaintiffs, and denies that Initiative 872 is unconstitutional.

II. JURISDICTION AND VENUE

6. In response to Paragraph 6 of the Complaint, the State admits that this case presents a federal question and that this Court has jurisdiction. The remainder of Paragraph 6 consists of legal argument and does not require a response.

7. In response to Paragraph 7 of the Complaint, the State admits that the Western District of Washington is a proper venue for this action.

III. PARTIES

8. In response to Paragraph 8 of the Complaint, the State admits that the Republican Party meets the definition of "major political party" set forth in RCW 29A.04.086. The State does not have knowledge sufficient to admit or deny the remaining allegations in Paragraph 8, but has no reason to doubt their truth.

9-14. In response to Paragraph 9 through 14 of the Complaint, the State lacks sufficient knowledge to admit or deny the allegations contained therein, but has no reason to doubt the truth of those allegations.

15. In response to Paragraph 15 of the Complaint, the State admits that this paragraph accurately names several county officers. These officers have powers and responsibilities as described in state law. The State further admits that all of the

counties mentioned in Paragraph 15, except Spokane County, lie within the Western District of Washington.

IV. WASHINGTON'S ELECTION SYSTEM

16. Responding to Paragraph 16 of the Complaint, the State admits that a primary will occur in September of 2005, and that it will include both "partisan offices" and nonpartisan offices as defined by Initiative 872. Initiative 872 defines "partisan office" as "a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name." I-872, § 4. The initiative measure further provides that for partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots. I-872, § 7(3). The initiative further states that "any party or independent preferences are shown for the information of voters only and may in no way limit the options available to voters." *Id.* When a primary is conducted for a partisan office, the top two candidates will be certified as qualified to appear on the general election ballot, unless only one candidate qualifies. I-872, § 7(2). To the extent that Paragraph 16 of the Complaint cites Washington statutes that are inconsistent with Initiative 872, the State asserts that these statutes have been superseded or impliedly amended by Initiative 872. The State specifically asserts that its primary is not used to nominate or select the candidates of any political

party for public office. Washington law neither requires political parties to nominate candidates for office, nor prevents them from doing so if they choose. The State has no specific knowledge as to whether defendants Logan, Kimsey, Dalton, and Terwilliger have made the assertions ascribed to them in Paragraph 16, but has no reason to doubt the accuracy of the allegation.

17. In response to Paragraph 17, the State denies that state law, including Initiative 872, interferes or seriously burdens the rights of political parties and their adherents to exercise their rights of association. State law does not force any political party to participate in state elections, including primaries. The State denies that permitting candidates to list a party preference on the primary ballot constitutes an "association" between the candidate and a political party or, if it does, that such an "association" constitutes any cognizable burden on the associational rights of the parties. The State denies that state law allows any person to appropriate a political party's name. To the extent this answer does not otherwise fully respond to the allegations in Paragraph 17, they are denied.

18. Paragraph 18 of the Complaint consists entirely of legal argument concerning the alleged legal effect of state law. To the extent an answer is required, the State denies that Paragraph 18 accurately states the law.

19. In response to Paragraph 19 of the Complaint, the State asserts that the Washington state primary as established in Initiative 872 does not select "standard-bearers" or party nominees. The

remainder of the allegations, which constitute legal argument concerning the effect of the initiative measure and other laws and the purposes behind its enactment, are denied.

20. The allegations contained in Paragraph 20 of the Complaint consist of legal argument. To the extent they require answer, they are denied. The Washington election system does not invade the plaintiffs' rights of political association.

21. The State denies the allegations contained in Paragraph 21 of the Complaint. Since Washington does not conduct a primary in which party nominees are selected, these allegations are not material.

V. ALLEGATIONS CONCERNING DENIAL OF EQUAL PROTECTION

22. In response to Paragraph 22 of the Complaint, the State asserts that Washington law no longer makes party nomination a part of the state's electoral process, although political parties may endorse candidates for any office. To the extent that RCW 29A.20.121 provided that minor party candidates would be placed on the general election ballot by virtue of nomination by convention, it has been superseded by Initiative 872 and is no longer operable. The State denies that its laws invade the associational rights of any political party, or that its laws deny the Plaintiffs the equal protection of the law.

23. In response to Paragraph 23 of the Complaint, this Paragraph cites statutes that have been superseded or rendered inoperable by the

enactment of Initiative Measure 872. The State denies that its election system denies to any political party the right to nominate its candidates, or to enforce any legally cognizable rights concerning use of a political party's name. As amended by Initiative 872, state law draws no constitutionally significant distinctions between major and minor parties.

VI. DEMOCRATIC PARTY OF WASHINGTON V. REED

24. Responding to Paragraph 24 of the Complaint, the State admits that the case of *Democratic Party v. Reed* was litigated, and resulted in a court declaration that a previous state primary system was unconstitutional. The State denies any remaining allegations in Paragraph 24.

25. Paragraph 25 of the Complaint consists of selected quotes from case law and of legal argument. The State admits that the quotations are accurate, though taken out of context. The State denies the remaining allegations in Paragraph 25.

26. Paragraph 26 of the Complaint consists of legal argument to the effect that Initiative 872 establishes an election system which has the same constitutional defects as the system invalidated in *Democratic Party v. Reed*. To the extent an answer is required, the State denies that its laws are unconstitutional.

VII. ALLEGATIONS CONCERNING DEPRIVATIONS OF CIVIL RIGHTS

27. Responding to the allegations in Paragraph 27 of the Complaint, the State admits that the Republican Party has adopted rules

governing the nomination of its candidates for public office and that those rules have been provided to various parties, including the county auditors.

28. The allegations contained in Paragraph 28 of the Complaint are legal argument. To the extent they require an answer, the State denies them.

29. The State denies the allegations contained in Paragraph 29 of the Complaint.

VIII. PLAINTIFFS' FIRST CAUSE OF ACTION

30. The State realleges and incorporates by reference Paragraphs 1-29 above.

31. Responding to Paragraph 31 of the Complaint, the State admits that there is a disagreement between the Plaintiffs and the State concerning the constitutionality of state election laws, but denies that the Plaintiffs have stated any cognizable claim for relief.

32. The State denies the allegations in Paragraph 32 of the Complaint.

33. The State denies the allegations in Paragraph 33 of the Complaint.

34. Responding to Paragraph 34 of the Complaint, the State admits that Initiative 872 has no specific severability clause, but denies that the absence of a severability clause would require the Court to void the entire enactment upon a finding that any portion is unconstitutional.

35. The State denies the allegations in Paragraph 35 of the Complaint.

IX. PLAINTIFFS' SECOND CAUSE OF ACTION

36. The State realleges and incorporates by reference Paragraphs 1 through 35 above.

37. The State denies the allegations in Paragraph 37 of the Complaint.

38. The State denies the allegations in Paragraph 38 of the Complaint.

X. PLAINTIFFS' THIRD CAUSE OF ACTION

39. The State realleges and incorporates by reference Paragraphs 1 through 38 above.

40. The State denies the allegations in Paragraph 40 of the Complaint.

41. The State denies the allegations in Paragraph 41 of the Complaint.

XI. PLAINTIFFS' FOURTH CAUSE OF ACTION

42. The State realleges and incorporates by reference Paragraphs 1 through 41 above.

43. The State denies the allegations in Paragraph 43 of the Complaint.

44. The State denies the allegations in Paragraph 44 of the Complaint.

45. The State denies the allegations in Paragraph 45 of the Complaint.

46. The State denies the allegations in Paragraph 46 of the Complaint.

XII. STATE'S DEFENSE

1. The Complaint fails to state a claim on which relief can be granted.

XIII. PRAYER FOR RELIEF

The State Intervenor Defendants respectfully request the Court to enter judgment as follows:

1. Dismissing the Complaint for failure to state a claim on which relief can be granted.

2. Declaring that Washington's election laws, and the conduct of elections under those laws, do not deprive the Plaintiffs of any legally cognizable constitutional or other rights protected by either the Constitution and laws of the United States or of the state of Washington.

3. Denying the declaratory and injunctive relief requested by the Plaintiffs or by Plaintiff Intervenors.

4. Granting the State its reasonable fees and costs to the extent permitted by law.

5. Granting such other relief as the Court may deem appropriate.

DATED this 2nd day of June, 2005.

ROB MCKENNA
Attorney General

MAUREEN A. HART, WSBA #7831
Solicitor General

James K. Pharris

JAMES K. PHARRIS, WSBA #5313
Sr. Assistant Attorney General

JEFFREY T. EVEN, WSBA #20367
Assistant Attorney General

PO Box 40100
Olympia, WA 98504-0100
360-753-6200

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, CHRISTOPHER VANCE, BERTABELLE HUBKA, STEVE NEIGHBORS, BRENT BOGER, MARCY COLLINS, MICHAEL YOUNG, Plaintiffs, v. DEAN LOGAN, King County Records & Elections Division Manager; BOB TERWILLIGER, Snohomish County Auditor; VICKY DALTON, Spokane County Auditor, GREG KIMSEY, Clark County Auditor, CHRISTINA SWANSON, Cowlitz County Auditor, VERN SPATZ, Grays Harbor County Auditor, PAT GARDNER, Pacific County Auditor, DIANE L. TISCHER, Wahkiakum County Auditor, and DONNA M. ELDRIDGE, Jefferson County Auditor, Defendants.	NO. 05-0927-Z **MOTION TO INTERVENE BY STATE OF WASHINGTON; SECRETARY OF STATE, SAM REED; AND ATTORNEY GENERAL, ROB MCKENNA** **Noted for Consideration: June 17, 2005**

The State of Washington, together with Sam Reed, Washington Secretary of State, and Rob McKenna, Washington State Attorney General,

move to intervene in this action as additional parties defendant. This motion is made pursuant to Civil Rule 24(a), (b), (c), and to 28 U.S.C. § 2403(b).

I. IDENTITY OF INTERVENORS

The State of Washington is one of the fifty sovereign states that constitute the United States of America. Sam Reed is the duly elected Secretary of State of the state of Washington. Rob McKenna is the duly elected Attorney General of the state of Washington. The State's Answer to the Complaint filed herein is Exhibit A to this Motion.

II. NATURE OF CASE

This is a suit brought by the Washington State Republican Party and certain of its officers, asserting that certain laws enacted by the State of Washington (specifically Initiative Measure No. 872, enacted by initiative and taking effect on December 2, 2004), are unconstitutional and that their implementation and enforcement should be enjoined. The Democratic and Libertarian Parties have filed motions to intervene, making allegations similar to those of the Republicans. The named defendants are the principal election officers of nine counties in Washington.

III. NATURE OF STATE'S INTEREST IN INTERVENING

Federal statute gives the State the right to intervene in a federal case, to offer evidence, and to present argument defending the constitutionality of a state law if a case includes an assertion that the state law is contrary to the United States

Constitution or to federal law. 28 U.S.C. § 2403(b). Civil Rule 24(c) instructs the Court to notify the State Attorney General in such a case.[1]

In addition, the State asserts that it is also entitled to intervene under Rule 24(a), because both Secretary Reed and Attorney General McKenna have duties and responsibilities that are affected by this action and which could be impaired or impeded if the State is not a party to the case. The Secretary of State is the chief elections officer of the State (RCW 29A.04.230) and is responsible for ensuring that county auditors are provided with the most recent version of the election laws (RCW 29A.04.235). The Secretary of State is authorized and directed to make rules concerning, among other subjects, the layout and preparation of ballots, the procedures and forms for declarations of candidacy for public office, procedures for filing for office, and the procedures for conducting partisan primary elections. RCW 29A.04.611.[2] The Attorney General is charged with appearing for and representing the State in all case in which the State is interested, and defending actions and proceedings against state officers and employees. RCW 43.10.030.

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[1] The Plaintiff Republican Party delivered a courtesy copy of the pleadings to the State Attorney General shortly after the case was filed.

[2] The Secretary of State has adopted emergency rules for the conduct of the 2005 elections under Washington's current election laws, including those enacted as parts of Initiative Measure 872. A copy of the rules adopted is Exhibit B to this Motion.

The State has no reason to doubt that the nine county officers named as Defendants will vigorously defend their actions and, by extension, the state laws they are responsible for administering. However, the State and its officers have a more direct responsibility to respect and defend the validity of state statutes, and to do so on behalf of the State itself. The State can also assist the county officers in coordinating the defense of the action.

In the alternative, the State is permitted to intervene under Civil Rule 24(b). State statutes and state rules will be relied on as a basis of claims and/or defenses in this case; Rule 24(b) permits the officers administering the statutes or rules to intervene.

DATED this 2nd day of June, 2005.

ROB MCKENNA
Attorney General

MAUREEN A. HART, WSBA #7831
Solicitor General

James K. Pharris

JAMES K. PHARRIS, WSBA #5313
Sr. Assistant Attorney General

JEFFREY T. EVEN, WSBA #20367
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The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, CHRISTOPHER VANCE, BERTABELLE HUBKA, STEVE NEIGHBORS, BRENT BOGER, MARCY COLLINS, MICHAEL YOUNG, Plaintiffs, v. DEAN LOGAN, King County Records & Elections Division Manager; BOB TERWILLIGER, Snohomish County Auditor; VICKY DALTON, Spokane County Auditor, GREG KIMSEY, Clark County Auditor, CHRISTINA SWANSON, Cowlitz County Auditor, VERN SPATZ, Grays Harbor County Auditor, PAT GARDNER, Pacific County Auditor, DIANE L. TISCHER, Wahkiakum County Auditor, and DONNA M. ELDRIDGE, Jefferson County Auditor, Defendants.	**No. C05-927Z** ~~**{PROPOSED}**~~ **ORDER GRANTING MOTION TO INTERVENE BY STATE OF WASHINGTON; SECRETARY OF STATE, SAM REED; AND ATTORNEY GENERAL, ROB MCKENNA**

The Court has reviewed the papers filed in support of and in opposition to the Motion to Intervene filed by the State of Washington, Sam Reed, and Rob McKenna, including any declarations

or exhibits. Being fully advised of the premises, the Court does here find and ORDER:

1. The Motion to intervene is GRANTED;

2. The Clerk is directed to accept for filing the Answer attached as Exhibit A to the Motion to Intervene;

3. All papers subsequently filed in this case shall be served on counsel for the State of Washington, Sam Reed, and Rob McKenna.

DONE IN OPEN COURT this *7th* day of June, 2005.

Thomas S. Zilly

_____

UNITED STATES DISTRICT COURT JUDGE

Presented by:

ROB MCKENNA
Attorney General

James K. Pharris

By _____

James K. Pharris, WSBA #5313
Sr. Assistant Attorney General
Attorneys for State of Washington Intervenors

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

v.

DEAN LOGAN, King County Records & Elections Division Manager, et al.,

Defendants,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff-Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, et al..

Plaintiff-Intervenors,

STATE OF WASHINGTON, et al.,

Defendant-Intervenors,

WASHINGTON STATE GRANGE,

Defendant-Intervenors.

No. C05-0927Z

DECLARATION OF DAVID T. MCDONALD IN SUPPORT OF THE WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S MOTION FOR SUMMARY JUDGMENT

Noted for Oral Argument: July 13, 2005

1. I am the lead attorney for Plaintiff in Intervention the Washington State Democratic Central Committee in the above-entitled action. I am over the age of eighteen years and I am competent to make this declaration. I make this declaration based on my own personal knowledge.

2. Attached as Exhibit A is a true and accurate copy of the Bylaws of the Democratic Party of the State of Washington ("Bylaws").

3. Attached as Exhibit B is a true and accurate copy of "Yes on 872," which is available at www.blanketprimary.org/faq.php. This document was printed from that website on June 17, 2005.

3. Attached as Exhibit C is a true and accurate copy of Washington Secretary of State Emergency Rule Making Order CR-103, dated May 18, 2005.

4. Attached as Exhibit D is a true and accurate copy of "State GOP picks Hammond – Dunn will still run in primary for 9th District," The King County Journal, reprinted at msnbc.msn.com. This document was printed from that website on June 17, 2005.

5. Attached as Exhibit E is a true and accurate copy of a December, 2004 PDC ("Public Disclosure Commission") brochure entitled "Political Advertising."

I declare under penalty of perjury that the foregoing is true and correct:

EXECUTED this 7th day of June, 2005 at Seattle, Washington.

David McDonald

David McDonald

EXHIBIT A

Bylaws of the Democratic Party of State of Washington

(As amended by WSDCC 1/24/04)

These bylaws are adopted pursuant to the Charter of the Democratic Party of the State of Washington.

Article I

State Democratic Convention

The State Convention of the Democratic party is the highest authority of the Democratic Party of the State of Washington, subject to the provisions of the Charter of the Democratic party of the State of Washington. The Convention shall be called by the Washington State Democratic Central committee pursuant to Articles V and VI and the State Charter.

Article II

Washington State Democratic Central Committee

A. Purpose and Powers

1. The Washington State Democratic Central Committee, also known as the State Central Committee ("SCC"), is the governing body of the Democratic Party of the State of Washington as authorized by the Democratic State Convention and the Charter of the Democratic party of the State of Washington.
2. The SCC shall have all powers and carry out all duties delegated to it by the Convention under the Charter. The SCC is the sole party organization authorized to collect and disburse funds in the name of the Democratic party of

the State of Washington. The SCC provides the funds, staff and other assistance necessary for the operations of its committees.

B. Membership

1. The SCC shall consist of the state committeewoman and the state committeeman elected from each legislative district and from each county of the State of Washington, without regard to whether each is a precinct committee officer, in compliance with Article III B of the Charter.

2. Members shall be elected for two-year terms and shall serve until their successors have been elected.

3. All Members of the SCC shall have equal voice and vote in the affairs of the SCC unless these Bylaws or the Charter expressly direct to the contrary.

4. The following shall be Special Members of the SCC. They shall be entitled to equal voice and vote in affairs of the SCC when in personal attendance. Special Members have no proxy. Except where expressly limited in the Charter or in these Bylaws, Special Members shall have all rights and privileges granted to Members under these Bylaws.

   a. The elected officers of the State Central Committee.

   b. National Committeemen, and National Committeewomen elected from the State of Washington.

c. The Governor of the State of Washington when that office is held by a Democrat.

d. United States Senators from the State of Washington is such offices are held by Democrats.

e. Members of the United States House of Representatives from the State of Washington if such Members are Democrats.

f. The Leader of the Washington State Senate Democratic Caucus.

g. The Leader of the Washington State House of Representatives Democratic Caucus.

h. A representative of the Young Democrats of Washington.

i. A representative of the Federation of Democratic Women's Clubs.

j. The Chair of the Organization of County and District Chairs; provided that in the absence of the Chair, the Vice-Chair of the Organization of County and District Chairs may serve in the Chair's stead, with vote, as an alternate.

k. The SCC may from time to time extend Special membership privileges, provided that any such Extension must be adopted by the SCC by unanimous vote and shall be submitted to the next convention for ratification.

C. Officers and Their Duties

1. The officers of the SCC shall be the Chair, Vice-Chair, Secretary, Treasurer and such other officers as the SCC shall from time to time authorize and elect.

2. The officers of the SCC shall be elected for two-year terms at the first meeting of the SCC in odd-numbered years or in the case of officers added by the SCC, in the manner and at the time specified by the SCC in the resolution establishing such office.

3. In the event of a vacancy in an office, the office may be filled by election at any regular or special meeting of the SCC, provided the written notice of the proposed election has been deposited in the mail, postage prepaid, to each member of the SCC at least 15 days in advance of the meeting.

4. Vice-Chair. The Vice-Chair shall:

   a. In the absence of the Chair, or in the event of a vacancy in that office or the disability of the incumbent, perform the duties of the Chair.

   b. Develop and maintain personnel policies and committee chair job descriptions and perform such other responsibilities as the SCC or its Executive Committee or the Chair may from time to time delegate.

5. Secretary. The Secretary shall;

   a. Prepare the minutes of all meetings of the SCC or its Executive Committee and the State Convention.

   b. Keep all records of the SCC.

   c. Perform such other duties as the SCC or its Executive Committee or the Chair may from time to time delegate.

6. Treasurer. The Treasurer shall:

   a. Maintain the financial records of the SCC and all committees, and be responsible for the accurate and timely filing of all reports required by the public disclosure or taxing authorities.

   b. Be the custodian of all funds and securities of the SCC, and all committees.

   c. Deposit and disburse funds of the SCC pursuant to the current budget and policies and procedures established by the SCC or its Executive Committee.

   d. Prepare and distribute a written financial report to each meeting of the SCC.

   e. Serve as a voting member of the Finance Committee.

   f. Perform such other duties as the SCC or its Executive Committee or the Chair may from time to time delegate.

7. National Committee Members

   a. The offices of National Committee members apportioned to the State of Washington by the Democratic national Committee shall be filled by election at large by the SCC during each Presidential election year.

   b. National committee members shall serve for four year terms and until their successors are elected.

   c. In the event of a vacancy in the post of National Committee member, the SCC shall elect a replacement to serve the balance of the term. The replacement shall be selected in the manner provided for filling vacancies in officer positions.

8. Removal of Officers. Any officer may be removed upon two-thirds vote of the SCC provided at least 15 days prior notice of the meeting and the grounds for removal are given to the members and the officer whose removal is sought.

D. Meetings

1. Regular Meetings

   a. The SCC shall meet at least once a calendar quarter, at a time and place selected by the Chair, pursuant to guidelines established by the SCC or its Executive Committee; provided, however, that the Chair shall rotate the meetings among Congressional District.

b. A call for each such meeting shall be mailed to all SCC Members at least 30 days in advance of the meeting.

c. In the absence of a call for a regular meeting, any twenty-five Members of the SCC may call such a meeting by issuing a proper call and proposed agenda.

2. Organizational Meeting.

a. The first regular meeting of the SCC in odd-numbered years shall be its organizational meeting. This meeting shall be held after legislative district and county organizational meetings, provided such meetings are held in the months of December and January immediately proceeding.

b. As its first orders of business at the organizational meeting, the SCC shall adopt temporary rules for the meeting, elect a chair and vice-chair and the other officers of the SCC.

c. In the absence of a call for an organizational meeting, any ten members of the SCC may call such a meeting by issuing a proper call and proposed agenda.

3. Special Meetings. A special meeting of the SCC may be called for any purpose by:

a. The Chair,

b. A majority of the Executive Committee,

c. Any 25 members of the SCC, provided that a proper call must be issued by the

convening authority at least 15 days in advance of the meeting.

4. Voting and Proxies

   a. All Members of the SCC shall have equal vote. In the event that any member shall be an officer or hold any additional position with the SCC which position carries a vote, the member shall nevertheless have only one vote in all affairs of the SCC.

   b. A division of the house may be called upon any point by 10%, and a roll call vote may be called by 20%, of those present and entitled to vote, including proxies.

   c. Voting by proxy shall be permitted in accordance with the following rules.

      (1) All proxies must be in writing, signed by the member. They may be specific or general, instructed or uninstructed, transferable or non-transferable, as specified by the maker. In the absence of specification, a proxy shall be deemed to be general, uninstructed and non-transferable.

      (2) No person shall hold more than one proxy.

      (3) In order to vote a proxy, the holder must register the proxy with the Secretary of the SCC before a vote is taken. Only the individual currently registered with the Secretary may vote the proxy.

(4) The holder of a proxy must reside in the county or legislative district in which the member giving the proxy resides.

5. Quorum

   a. A quorum of the SCC shall be 40% of those eligible to vote. For purposes of determining a quorum, valid proxies shall be counted.

   b. Once a quorum is established, the Chair need not entertain a quorum call until all business included in the adopted agenda for the meeting has been transacted.

6. Robert's Rules. In all matters not covered expressly the these Bylaws, Robert's Rules of Order, newly revised, shall prevail.

7. Open Meetings. All meetings of the SCC shall be open to all Democrats, except when called into Executive Session by majority vote.

E. Committees

1. The SCC shall have the following Standing Committees: Resolutions Committee, Rules and Bylaws Committee, Affirmative Action Committee; Finance Committee, Elections Committee;

2. The Standing Committees shall:

   a. each meet at the call of its chair.

   b. each report fully on its activities and proposed activities to the SCC Chair, at such times and in such form as the SCC Chair shall deem appropriate.

c. and each submit annually to the SCC a proposed budget for the SCC approval.

3. The Resolutions committee shall review proposed resolutions to the SCC and recommend their adoption or rejection; and propose rules and procedures to the SCC for the handling of resolutions.

4. The Rules and Bylaws Committee shall recommend rules of procedure for the conduct of meetings or the handling of special matters to the SCC and recommend amendments to existing rules or these Bylaws; and review proposed bylaw amendments submitted to the SCC and recommend adoption or rejection.

5. The Affirmative Action Committee shall propose and coordinate an affirmative action plan, and with the approval of the Executive Committee implement the plan, to discharge the SCC's affirmative action responsibilities under the charter of the Democratic party of the United States and the Charter of the Democratic Party of Washington.

6. The Finance Committee shall propose methods of raising funds for the SCC and, with the approval of the Executive committee, implement and coordinate fundraising plans. The Treasurer of the SCC shall be a member of the Finance Committee.

7. The Elections Committee shall propose policies and procedures to the SCC on candidate recruitment and endorsements, fair campaign practices, political ethics, and other

party policy areas as determined by the SCC or the SCC Chair.

8. Others Committees.

   a. The SCC may from time to time establish other committees to carry out such duties and have such powers at the SCC may establish. Members of such committees need not be members of the SCC.

   b. The Chair may from time to time appoint such committees to report to the Chair as the Chair may deem necessary or prudent. Such committees shall have such powers as are granted by the Chair, provided, however, that the Chair may not grant greater powers to a committee than the SCC has given the Chair.

9. Committee membership. Unless the enabling resolution shall specify a method of selection of members of a committee and its composition, the chair shall appoint the members of the committee.

10. Committee Rules. Any Committee may adopt rules of procedure for the conduct of its affairs. In the absence of specific rules, Robert's Rules of Order, newly revised, shall govern the conduct of committee affairs.

11. Minority Reports. Minority Reports may be issued from any Committee on concurrence of at least 20% of the Committee's membership.

12. Additional Duties. Committees shall perform such additional duties as the SCC shall propose.

13. Limitations on Committee Activities. The following limitations shall govern the activities of au Committees except the Executive Committee. The Committees shall not be authorized to–

    a. incur expenses or enter contracts on behalf of the Democratic party, except as specifically authorized by the SCC.

    b. issue press releases or make public statements in the name of the Democratic Party of the State of Washington except as specifically authorized by the SCC Chair.

F. Availability of Members' List – In order that Members of the SCC shall be able to freely communicate with other Members for the purpose of proposing resolutions, bylaws, amendments or other business requiring notice to the SCC under these Bylaws, the Chair shall make available to Members a mailing list of the members of the Committee at cost.

Article III

Executive Committee

A. The Executive Committee shall consist of the Chair, Vice-Chair, Treasurer, Secretary, National Committeemen and Committeewomen, the chairs of the Finance, Statutory State and Affirmative Action committees, and a representative of the Washington State Federated Democratic Women's Clubs, together with the SCC member elected by and from the SCC membership in each Congressional District.

B. The Executive Committee shall meet at the call of the Chair and have such powers and duties as are delegated to it by the SCC. AR actions of the Executive Committee must be reported to the SCC at the next SCC meeting. The Executive Committee shall prepare an annual operating budget.

Article IV

Budget, Compensation and Reimbursement

A. No later than the regular Second Quarter meeting, the SCC shall adopt a budget for the following year. Budgeted expenditures shall be divided into two parts as follows: part A shall cover all expenses for the administration of the SCC; and Part B shall cover all funds disbursed to candidates or political committees or expended directly on their behalf. Rules for the disbursement of part B funds shall be adopted annually by the SCC. no funds shall be disbursed or obligated or on behalf of the SCC except in accordance with the adopted budget and any applicable rules. The budget shall be amendable.

B. Officers or employees of the Washington State Democratic Party may be compensated and reimbursed for expenses in such amount and manner as determined by the SCC or its Executive Committee. In the absence of explicit authority to do so, no officer or employee shall receive compensation.

C. The Executive Committee may require that the books be audited at any time. Subject to Executive Committee confirmation, the Chair

shall establish an audit committee promptly after each reorganization meeting. The results of the audit shall be considered by the Executive Committee and then reported to the SCC no later than its regular second quarter meeting.

Article V

Chair of the Democratic Party of the State of Washington

A. The Chair of the Democratic party of the State of Washington shall:

1. Be the Chief Executive Officer of the SCC and preside at all meetings of the SCC or its Executive Committee.

2. Be charged with the responsibility for implementing all policies of the SCC. 3. Provide for the call to all meetings of the SCC or its Executive Committee.

4. Provide a provisions agenda for all meetings of the SCC or its Executive Committee.

3. Perform such additional duties as the SCC or its Executive Committee shall delegate to the Chair.

6. Except as otherwise provided in these bylaws, appoint the chairs of standing and special committees of the SCC.

7. Appoint legal counsel for the Washington State Democratic Party and appoint such other professionals as may be required from time to time to act for the party. Such appointments must be confirmed by a majority vote of the Executive Committee.

8. Appoint a parliamentarian, Sergeants-at-Arms, Pages, Tally Clerks and such other individuals as may be necessary for the efficient and fair administration of SCC meetings.

9. Be the Authorized Spokesperson for the Democratic party of the State of Washington.

10. Be an ex-officio voting member of all committees of the SCC except the Statutory Committee.

11. Appoint such deputy treasurers as may be needed to assist the Treasurer in filing reports.

Article VI

Statutory State Committee

A. The Statutory State Committee shall be organized according to state law (RCW 29.42.020) and shall perform only those duties explicitly specified by RCW 29.42.020(1) through (4), to wit:

"(1) Call conventions at such time and place and under such circumstances and for such purposes as the call to convention shall designate. The manner, number and procedure for selection of state convention delegates shall be subject to the committee's rules and regulations duly adopted;"

"(2) Provide for the election of delegates to national conventions;"

"(3) Fill vacancies on the ticket for any federal or state office to be voted on by the electors of more than one county;"

"(4) Provide for the nomination of presidential electors."

B. The statutory state committee shall adopt bylaws which shall delegate those duties to the State Central Committee and which shall provide that the Chair of the Democratic party of the State of Washington shall be the chair of the statutory state committee and that the Vice-Chair elected by the state central committee shall be the vice-chair of the statutory state committee.

Article VII

Vacancies, Appointments

A. The Statutory State Committee of the Washington State Democratic Central Committee is subject to a permanent injunction issued by the Federal District Court in Cunningham v. Washington State Democratic Committee (Civ. No. C75-901, W.D. Wash 1977), enjoining the Statutory State Committee from filling vacancies on the ticket for any federal or state office voted upon by the electors of two or more counties, or filling vacancies on the ticket in legislative races, or making interim legislative appointments, in multi-county legislative districts by any method that contravenes the one person, one-vote rule. Pursuant to the delegation of authority of Article VI. B. above, the SCC shall be responsible for compliance with this injunction.

B. In making interim legislative appointment in multi-county legislative districts, the SCC shall make its appointment from a list of three names submitted to the committee by a caucus of the elected and appointed Democratic precinct committee officers of the precincts within the legislative district. The chair of the SCC shall call this caucus.

C. In making interim legislative appointments in single county legislative districts, the county central committee shall make its appointment from a list of three names submitted to the committee by a caucus of the elected and appointed Democratic precinct committee officers of the precincts within the legislative district. The county chair shall call this caucus.

D. The SCC shall develop rules for the conduct of legislative appointment caucuses.

Article VIII

County Central Committees

A. The County central committee shall be the governing body of the county Democratic party and shall have the responsibility for conducting party affairs at the county level. It shall be composed of all elected and appointed precinct committee officers.

B. In any county central committee only elected precinct committee officers and precinct committee officers appointed after the organizational meeting shall vote for county chair, vice chair, state committeewoman, state committeeman, any representative the county

central committee is authorized to send to other party organizations and on the adoption or amendment of bylaws. County central committees may allow other Democrats to participate in all other functions.

C. Each county central committee shall be organized according to state law, the Charter and Bylaws of the Democratic Party of the State of Washington, and other provisions pursuant to the authority of the Charter. Its organizational meeting shall take place in December or January following each state general election held in even-numbered years. At the organizational meeting the committee shall elect a chair, a vice chair, a state committeewoman, a state committeeman and any representatives it is authorized to send to other party organizations.

D The county central committee shall have a minimum of four (4) regular meetings a year unless there are legislative district organizations within the county.

E. In counties with legislative district organizations, the county central committee may establish a county executive board.

Article IX

Legislative District Organizations

A. The legislative district organization shall be the governing body of the legislative district Democratic Party and shall have the responsibility for conducting party affairs at the legislative district level. It shall be composed of

all elected and appointed precinct committee officers.

B. In any legislative district organization only elected precinct committee officers and precinct committee officers appointed after the organization meeting shall vote for district chair, vice chair, state committeewoman, state committeeman, any representative the legislative district organization is authorized to send to other party organizations, and on the adoption or amendment of bylaws. Legislative district organizations may allow other Democrats to participate in all other functions.

C. Each legislative district organization shall be organized according to state law, the Charter and Bylaws of the Democratic Party of the State of Washington, and other provisions pursuant to the authority of the Charter. The legislative district organization shall be organized in accordance with rules passed by the county central committee in those counties in which there are two or more complete legislative districts. In legislative districts where counties have not provided for legislative district organization meetings, the state chairperson shall do so. Its organizational meeting shall take place in December or January following each state general election held in even-numbered years. At the organizational meetings, the legislative district organization shall elect a chair, a vice chair, a state committeewoman, a state committeeman, and any representatives it is authorized to send to other party organizations. The legislative

district organization shall have a minimum of four (4) regular meetings a year.

Article X

Organization of County and District Chairs

A. The Organization of County and District Chairs shall be composed of the chair of each Democratic County Central committee and the chair of each Democratic Legislative District organization in the State of Washington.

B. The organization shall elect from its ranks a chair, vice-chair and such other officers as the organization shall be deemed appropriate.

C. The Organization shall recommend to the SCC for its consideration actions or expenditures to promote the grassroots structure of the Party and shall perform such additional duties and have such additional powers as the SCC may by resolution delegate.

Article XI

Selection of Nominees, Candidates and Delegates

A. Delegates to party conventions at all levels and party officers (whether or not such delegates and officers are declared by the State to be public officials) shall be selected by voters who support the principles of the Democratic party and wish to be publicly known as Democrats.

B. Except as otherwise required by the Charter, By-laws and Rules of the Democratic Party of the United States or by the Delegate Selection Rules of the Democratic National Committee,

candidates and nominees for public office who are or will be identified as Democrats or publicly associated with the Democratic party to any extent in the general election for such office must be selected in accordance with rules adopted by the State Central Committee. The rules adopted by the State Central Committee shall permit participation, subject to guarantees of election fairness and accountability, by voters who wish to participate in the selection but do not wish to become publicly affiliated with the Democratic party; provided the Rules may forbid the participation of any voter who has participated or will participate in the selection of candidates associated with another political party if such candidates seek to appear on the same primary or general election ballot as any Democratic candidate being selected by the process in which the voter seeks to participate.

C. In connection with any selection process in which voters who are not members of the Democratic Party are permitted to participate, the State Central Committee may require that candidates demonstrate prior to filing for office reasonable support from Party members in order to be eligible to participate in the selection process; PROVIDED, that any such requirement shall have been adopted not less than ninety days prior to the filing period for the selection process, and further provided that any such requirement shall apply equally to all candidates for each particular office.

Article XII

Amendments, Rules

A. No amendment to these Bylaws may be considered by the SCC unless notice of the proposed amendment shall have been mailed to the SCC members at least 15 days in advance.

B. Bylaws may be amended by affirmative vote of a majority of the entire membership of the SCC.

C. The SCC may from time to time adopt additional procedural rules consistent with these Bylaws for the conduct of meetings or the handling of special matters, or relating to the operation of other Party organizations. Such rules may be adopted by majority vote, but once adopted shall require a two-thirds vote to suspend.

D. Each county central committee and legislative district organization shall adopt bylaws, which shall establish a quorum and provide for calling special meetings by executive action or by petition of members.

EXHIBIT B

YES ON 872

PROTECT OUR RIGHT TO VOTE FOR THE PERSON, NOT THE PARTY

Initiative 872 Frequently Asked Questions

Washington State Grange President Terry Hunt filed approximately 300,000 signatures with the Secretary of State on July 2, 2004 for Initiative 872 to establish a qualifying primary, or "top-two" system. This will allow voters the opportunity to have the final say over the Washington State's primary election system. These questions and answers relate to the initiative and the legal and legislative context in which it is being proposed.

Why do we need Initiative 872?

Last fall, the Ninth Circuit Court of Appeals ruled that Washington could no longer conduct "blanket primaries", as it has for nearly seventy years. When the U. S. Supreme Court declined to review the lower court decision, the Legislature adopted a new type of primary, called a "qualifying primary" or a "top-two primary". However, the Governor extensively vetoed that bill, eliminating the qualifying primary and creating instead a nominating primary, or "Montana-style" system in which voters will only be able to vote for the candidates of a single party in the primary. This is the system voters will face in September 2004, and they're effectively being forced to vote a straight party ticket. This is why we need to implement I-872.

Why did we have to change our primary system at all?

In the blanket primary, each political party was guaranteed one "nominee" on the general election ballot, and voters could vote for any candidate for any office. The court ruled that we cannot do both of these things at the same time. We can have a nominating primary (where each party is guaranteed a position on the general election ballot) or we can change to a qualifying primary (where voters can continue to choose from among all the candidates in each office). The Legislature was forced to change one or the other aspect of the current law.

What is the difference between a "nominating primary" and a "qualifying primary"?

In a nominating primary, assuming candidates for all major parties file for an office, one candidate from each party is "nominated" to appear on the general election ballot for that office. Washington currently has three major political parties – Democrat, Republican, and Libertarian.

In a qualifying primary, no matter how many parties or candidates there are for an office, the two candidates who receive the most votes for each office in the primary advance to the general election.

Does this mean that, in a qualifying primary, the candidates are nonpartisan?

No, the candidates will continue to express a political party preference when they file for office and that party designation will appear on the ballot. However, party preference would not be a factor in determining which candidates advance to the

general election. The two candidates who receive the most votes for each office, regardless of party preference, will appear on the ballot at the general election.

Would the primary ballot look any different to the voter?

No. At the primary, the candidates for each office will be listed under the title of that office, the party designations will appear after the candidates' names, and the voter will be able to vote for any candidate for that office (just as they did under the blanket primary).

Would the general election ballot look different to the voter?

Sometimes, but only rarely. Depending on the number of candidates on the primary ballot for a particular office and the amount of public support each candidate achieves, the voter might be presented with a choice in the general election between two candidates of the same political party. This would only happen if both of those candidates received more votes in the primary than any other candidates (in the same party or any other political party). A qualifying primary forces political parties to recruit the best possible candidates and to actively contest all of the offices on the ballot.

In a qualifying primary, would there be offices on the general election ballot where both candidates are from the same party?

This can happen, but it should be fairly rare. According to research conducted by the secretary of state's office, only 4 percent of the legislative races in

the last 10 years would have sent candidates of the same party to the general election under the top-two system. In addition, only 3.3 percent of statewide and congressional races in the last 10 years would have advanced candidates of the same party under the top-two. In addition, the vast majority of these instances would have been in "safe" districts where one political party is very dominant and only one candidate from that party emerges from the primary. In that kind of a district, the general election voters would sometimes have a choice between both strong candidates, instead of having the race decided in the primary.

Unfortunately, we have seen recent races for Governor where one of the major parties nominated a candidate that received less than 40% of the vote in the general election. Under this initiative, parties should seek candidates with broad public support who can survive the competitive primary.

Why does the Grange think that a qualifying primary is better than a nominating primary?

There are three reasons:

1. Qualifying primaries are more competitive than nominating primaries. If a party is concerned about not being "included" in the general election, then that party will need to work harder to make sure they recruit quality candidates who can get the votes to move forward. This is a positive thing, because we not only have more choices, but we have better choices. Competition works, and it's served our country very well.

2. With qualifying primaries, the results are more representative of the political preferences and opinions of the voters. As a result, these officials are likely to be much more responsive to the interests of the people they represent, not just the interest of the political parties. Public officials should be selected by the voters, not by political parties. Voters pay their salaries and for the elections that allow them to choose their public officials.

3. Most of the voters in Washington are independents who want to support candidates of any political party – they want to vote for the person, not the party.

Does this proposed initiative create a "Cajun" primary, like they have in Louisiana?

Absolutely not. In Louisiana, voters are required to register by political party, and if a candidate receives more than 50% of the vote for an office at the primary, he or she is elected (the office does not even appear on the general ballot). Under this proposed initiative, voters would never have to declare political party affiliation and every office would appear on the general election ballot.

Would this proposal eliminate minor party candidates from the primary or general election ballot?

No. Minor parties would continue to select candidates the same way they do under the blanket primary. Their candidates would appear on the primary ballot for each office (as they do now). Minor party candidates have had good success recently advancing candidates to the general election

in districts where only one of the major political parties runs a candidate (about 15% of all legislative districts). Presumably they would continue to do well in these circumstances.

Is the qualifying primary (proposed in Initiative 872) constitutional?

Although the U. S. Supreme Court and the Ninth Circuit have ruled that this form of primary is different from the partisan blanket primary previously in use in Washington state and that nonpartisan blanket primaries are not subject to the kind of legal challenge presently being made by the political parties, the major political parties have repeatedly claimed – without foundation – that the kind of qualifying primary proposed in I-872 is unconstitutional. the majority opinion of the U. S. Supreme Court in the CAL DEMO case (in 2000) went out of its way to declare what kind of primary would meet its constitutional test. They said,

"Finally, we may observe that even if all these state interests were compelling one, Proposition 198 is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a nonpartisan blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot – which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the

characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness" – all without severely burdening a political party's First Amendment right of association." (emphasis provided).

The Washington State Grange believes that the qualifying primary satisfies this description provided by the Supreme Court. If I-872 is approved by the voters and the political parties challenge, we are convinced that it can be successfully defended by the Attorney General.

EXHIBIT D

June 17, 2005 Motion for Summary Judgment of Plaintiff Washington State Republican Party [Doc. #49]

June 17, 2005 Supplemental Declaration of John J. White, Jr., re Motion for Summary Judgment [Doc. #50]

June 17, 2005 Motion for Summary Judgment of Intervenor Plaintiff Libertarian Party of Washington State [Doc. #52]

June 17, 2005 Supplement re Motion for Summary Judgment of Libertarian Party (correcting e-filing errors) [Doc. #54]

June 17, 2005 Motion for Summary Judgment of Intervenor Plaintiff Washington State Democratic Central Committee [Doc. #55]

June 17, 2005 Declaration of Paul Berendt re Motion for Summary Judgment of Democratic Central Committee [Doc. #56]

June 17, 2005 Declaration of David T. McDonald re Motion for Summary Judgment of Democratic Central Committee [Doc. #57]

June 17, 2005 Supplements re Motion for Summary Judgment of Libertarian Party (correcting e-filing errors) [Doc. #s 58-60]

June 23, 2005 Supplement re Motion for Summary Judgment of Washington State Republican Party [Doc. #63]

June 23, 2005 Declaration of Kevin B. Hanson re Motion for Summary Judgment of Washington State Republican Party [Doc. #64]

July 1, 2005 Response by Intervenor Defendant State of Washington to Motions for Summary Judgment [Doc. #65]

July 1, 2005 Declaration of James K. Pharris re Response of State of Washington [Doc. #66]

July 1, 2005 Stipulation and Agreed Order of Substitution and Dismissal [Doc. #67]

July 1, 2005 Declaration of Rod Dembowski re Intervenor Washington State Grange's Response to Motions for Summary Judgment [Doc. #68]

July 1, 2005 Exhibits A-V to Declaration by Washington State Grange in Response to Motions for Summary Judgment [Doc. #69]

July 1, 2005 Response by Intervenor Defendant Washington State Grange to Motions for Summary Judgment [Doc. #70]

July 5, 2005 Errata and Replacement Brief by Washington State Grange [Doc. #72]

July 5, 2005 Supplement to Exhibit G to Declaration of Rod Dembowski by Washington State Grange [Doc. #73]

July 6, 2005 Reply of Intervenor Plaintiff Washington State Democratic Central Committee [Doc. #75]

July 6, 2005 Second Declaration of David T. McDonald filed by Washington State Democratic Committee [Doc. #76]

July 6, 2005 Response by Plaintiff Washington State Republican Party [Doc. #77]

July 6, 2005 Reply of Intervenor Plaintiff Libertarian Party of Washington [Doc. #78]

July 6, 2005 Declaration of Richard Winger filed by Libertarian Party of Washington [Doc. #79]

July 6, 2005 Reply of Plaintiff Washington State Republican Party [Doc. #81]

July 6, 2005 Supplemental Declaration of Kevin B. Hansen filed by Washington State Republican Party [Doc. #82]

July 8, 2005 Answer of Intervenor Defendant State of Washington to Complaint of Libertarian Party of Washington State [Doc. #83]

July 8, 2005 Answer of Intervenor Defendant State of Washington to Complaint of Washington State Democratic Central Committee [Doc. #84]

July 13, 2005 Minute Entry: Oral Argument Held; Court signs stipulation and agree order of substitution and dismissal; hears argument and takes matter under advisement [Doc. #85]

July 13, 2005 Stipulation and Order of Substitution and Dismissal [Doc. #86]

July 15, 2005 Order and Preliminary Injunction by Judge Thomas S. Zilly [Doc. #87]

July 22, 2005 Praecipe to Attach Proposed Order Granting Permanent Injunction [Doc. #88]

July 27, 2005 Objections by State of Washington re Praecipe to Attach Proposed Order [Doc. #90]

July 27, 2005 Objections by Washington State Grange re Praecipe to Attach Proposed Order [Doc. #91]

July 28, 2005 Minute Order by Judge Thomas S. Zilly re Plaintiffs' request to respond to Defendants' Objections [Doc. #92]

July 29, 2005 Response of Washington State Republican Party [Doc. #93]

July 29, 2005 Permanent Injunction by Judge Thomas S. Zilly [Doc. #94]

July 29, 2005 Notice of Appeal of Washington State Grange [Doc. #95]

July 29, 2005 Civil Appeals Docketing Statement by Washington State Grange [Doc. #96]

July 29, 2005 Notice of Appeal of State of Washington [Doc. #97]

July 29, 2005 Civil Appeals Docketing Statement by State of Washington [Doc. #98]

August 1, 2005 Transcript of Proceedings filed for 7/13/05 Hearing [Doc. #101]

August 3, 2005 Appeal Notification Packet sent to US Court of Appeals re Washington State Grange Appeal [Doc. #99]

August 4, 2005 Appeal Notification Packet sent to US Court of Appeals re State of Washington Appeal [Doc. #100]

August 5, 2005 (Proposed) Time Schedule Order filed by Washington State Grange [Doc. #101]

August 5, 2005 (Proposed) Time Schedule Order filed by State of Washington [Doc. #102]

August 8, 2005 Notice by Washington State Grange Ordering Entire Transcript [Doc. #104]

August 8, 2005 Letter by John J. White Requesting Status Conference {Doc. #105]

August 10, 2005 Motion for Attorney Fees by Libertarian Party [Doc. #106]

August 12, 2005 Order by Judge Thomas S. Zilly [Doc. #107]

August 22, 2005 Order by US Court of Appeals re Briefing Schedule [Doc. #108]

September 2, 2005 Order by US Court of Appeals Amending Briefing Schedule [Doc. #109]

January 4, 2006 Clerk's Record on Appeal transmitted to US Court of Appeals

April 27, 2006 Agreed Motion to Substitute Parties filed by Washington State Republican Party [Doc. #110]

May 4, 2006 Order Granting Motion to Substitute Parties [Doc. #111]

September 18, 2006 Mandate of US Court of Appeals filed [Doc. #112]

September 18, 2006 Costs Taxed Against State of Washington [Doc. #113]

October 6, 2006 Order of USCA Amending Mandate to Reflect Amended Attorney Fees [Doc. #114]

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, CHRISTOPHER VANCE, BERTABELLE HUBKA, STEVE NEIGHBORS, BRENT BOGER, MARY COLLINS, MICHAEL YOUNG, Plaintiffs, v. DEAN LOGAN, King County Records & Elections Division Manager; BOB TERWILLIGER, Snohomish County Auditor; VICKY DALTON, Spokane County Auditor, GREG KIMSEY, Clark County Auditor, CHRISTINA SWANSON, Cowlitz County Auditor, VERN SPATZ, Grays Harbor County Auditor, PAT GARDNER, Pacific County Auditor, DIANE L. TISCHER, Wahkiakum County Auditor, DONNA ELDRIDGE, Jefferson County Auditor, Defendants,	Case No: CV05-0927-TSZ COMPLAINT FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF REGARDING INITIATIVE 872 AND PRIMARY ELECTIONS

NATURE OF ACTION

1. The First and Fourteenth Amendments to the United States Constitution guarantee the right of individuals to associate in a political party,

the right of that party and its adherents to select their nominees for partisan political office, and the right of that party and its adherents to limit participation in the process of selecting nominees to those voters the party and its adherents identify as sharing their interests and persuasions. As the Ninth Circuit noted in striking down Washington's blanket primary, "... the Washington statutory scheme prevents those voters who share their affiliation from selecting their party's nominees. The right of people adhering to a political party to freely associate is not limited to getting together for cocktails and canapés. Party adherents are entitled to associate to choose their party's nominees for public office." *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213, *cert. denied sub nom., Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957 (2004) ("*Reed*").

2. One of the fundamental purposes of the First Amendment is to provide for and promote competition between ideas in American civilization. This purpose is advanced by requiring the selection of a political party's candidates and nominees by its adherents rather than by those opposed to or indifferent to the party.

3. The State of Washington ("the State") has enacted Initiative 872, attempting to prevent the Washington State Republican Party ("the Party") and its adherents from selecting their nominees, and to force the Party to be associated publicly with candidates who have not been nominated by the Party, who will alter the political message and agenda the Party seeks to advance, and who will

confuse the voting public with respect to what the Party and its adherents stand for. The State seeks to appropriate the use of the Republican Party's name in primaries and general elections in order to protect the political interests of the incumbent and the well-known at the expense of the committed and the innovative. Acting under color of law, state and local officials force the Party and its adherents to include supporters of other parties and political interests in determining which, or whether any, candidate will carry the Republican Party name in the general election.

4. Initiative 872, as set forth in both Sections 2 and 18, was expressly intended to defeat the First Amendment rights of the Party and its adherents, recognized by the U.S. Supreme Court in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) and *Reed* ("In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective...."). The Initiative, as implemented by State and local officials, eliminates mechanisms previously enacted by the state to protect these rights and provides no effective substitute mechanisms for the Party and its adherents to protect their rights of association and of determining the Party's message.

5. This is an action to protect the First Amendment rights of the Party and its adherents to advocate and promote their vision for the future without censorship or interference by the State and County Auditors acting under color of the laws of the State of Washington. Initiative 872 is unconstitutional.

JURISDICTION AND VENUE

6. Plaintiffs' rights of political association and political expression are guaranteed against abridgement by the State and those acting under color of its laws by the First and Fourteenth Amendments to the United States Constitution and by 42 U.S.C. § 1983. This case presents a federal question involving federally-protected rights, including freedom of speech and protection against state-imposed burdens upon the associational rights of the Party and its adherents, as set forth in *Jones* and *Reed*. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331, 1343(a)(3), 2201 and 2202.

7. Defendants reside in the Western District of the State of Washington (the "Western District") and the conduct that gives rise to Plaintiffs' claims substantially occurred and threatens to occur within the Western District. Venue for this action lies within the Western District pursuant to 28 U.S.C. § 1391(b).

PARTIES

8. The Party is a "major political party" as defined in RCW 29A.04.086 and is organized for the purposes of promoting the political beliefs of its adherents, selecting and supporting candidates who support the political beliefs of the Party's adherents and electing public officials who will conduct government affairs in a manner consistent with the Party's philosophy. The Party has all the powers inherent in a political organization and is empowered to perform all functions inherent in a political party.

9. Plaintiff Christopher Vance is a resident of the Western District. He is the elected Chairman of the Republican State Committee, the governing body of the Party, and is the political and administrative head of the Party pursuant to its Bylaws and RCW 29A.80.020 *et seq.*

10. Plaintiff Brent Boger is a resident of the Western District and a member of the Party's State Committee.

11. Plaintiff Marcy Collins is a resident of Washington and a member of the Party's State Committee.

12. Plaintiff Bertabelle Hubka is a resident of the Western District, a Party adherent, and a registered voter in King County.

13. Plaintiff Steve Neighbors is a resident of the Western District, chairman of the Snohomish County Republican Party, and a registered voter in Snohomish County.

14. Plaintiff Michael Young is a resident of the Western District, Chairman of the King County Republican Party, and a registered voter in King County.

15. Defendants Dean Logan, King County Records & Elections Division Manager; Bob Terwilliger, Snohomish County Auditor; Vicky Dalton, Spokane County Auditor; Greg Kimsey, Clark County Auditor; Christina Swanson, Cowlitz County Auditor; Vern Spatz, Grays Harbor County Auditor; Pat Gardner, Pacific County Auditor; Diane L. Tischer, Wahkiakum County Auditor; and Donna M. Eldridge, Jefferson County Auditor ("the County

Auditors") are election officers in the State, having the overall responsibility under RCW 29A.04.025 to conduct primary elections within their respective counties, including providing and tabulating ballots for such elections consistent with the rules established by the Secretary of State ("the Secretary"). The County Auditors, except Vicky Dalton, reside in the Western District.

WASHINGTON'S PARTISAN PRIMARY

16. The Defendants will administer partisan primaries in September of 2005. Pursuant to the laws of the State, the Party is required to advance its candidates for congressional, state and county offices by means of partisan political primaries administered by the Secretary and the County Auditors. Under RCW 29A.52.116, "Major political party candidates for all partisan elected offices, except for president and vice-president ... must be nominated at primaries held under this chapter." The mandatory notice of the primary under RCW 29A.52.311must contain "the proper party designation" of each candidate in the primary. Under RCW 29A.52.112, adopted by I-872, if a candidate for partisan office "has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots." The same statute also provides that the "top two" vote-getters in the primary will advance to the general election. The Secretary has asserted that only the two candidates who receive the most votes in the primary will advance to the general election even if both candidates are associated with the same political

party. Defendants Logan, Kimsey, Dalton and Terwilliger have all asserted: "At this time, I am not aware of any language associated with the Initiative that contemplates a partisan nomination process separate from the primary."

17. Neither the laws of the State nor the rules adopted or proposed by the Secretary provide any mechanism for the Party and its adherents to effectively exercise their right of association in connection with the partisan primary in which they are forced by State law to participate. Any person may appropriate the Party's name, regardless of whether the Party desires affiliation with that person.

18. The State, through its filing statute, compels the Party and its adherents to associate with any person who files a declaration of candidacy expressing a "preference" for the Party, regardless whether the Party and its adherents desire association with that person.

19. In addition to requiring the Party and its adherents to accept as their candidate any person without regard to the person's political philosophy or participation in Party affairs, RCW 29A.04.127 forces the Party and its adherents to permit any voter to participate in selection of the Party's standard-bearer without regard to the voter's partisan affiliation or beliefs. The State thus forces the Party and its adherents to associate with those who do not share their beliefs or are openly antagonistic to them. Initiative 872 was intended to establish a *de facto* blanket primary in response to a judicial determination that the blanket primary is

unconstitutional, to facilitate cross-over voting and ticket-splitting, depriving the Party and its adherents of their right to prevent supporters of other political parties and interests from participating in their candidate selection and nomination processes. It was intended to force the Party to modify its message or have a modified message forced upon it by the simple expedient of eliminating the selected spokesmen of the Party and its adherents in favor of a spokesman selected by non-adherents of the Party. The sponsors' official statement in support of the Initiative states, "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." This attempt to force the Party to modify its message was rejected as a legitimate state interest by both the Supreme Court in *Jones* and the Ninth Circuit in *Reed*.

20. The other interests asserted as the basis for adopting I-872, codified as RCW 29A.04.206, were also rejected in *Reed* as legitimate grounds for invading the right of political association.

21. The Party and its adherents are irreparably injured by the forced adulteration of the Party's nomination process, by the State's active encouragement of cross-over voting and ticket-splitting, and by the resulting dilution and potential suppression pf the Party's message. The presence and participation of non-party voters in the partisan primary inevitably alters candidates' messages and actions and thereby dilute the Party's message and influence. Dilution of Party adherents' vote in any partisan primary carries with it the risk that the

Party will be denied a place on the general election ballot to the extent that only the "top two" vote-getters will appear on the general election ballot. For example, if seven candidates carrying the Party name each receive 10% of the vote at a partisan primary, and two candidates of other parties each receive 15%, the Secretary maintains there would be no Party candidate on the general election ballot, despite the receipt by candidates carrying the Party's identification of 70% of the total vote.

DENIAL OF EQUAL PROTECTION OF LAWS

22. In contrast to the State's invasion of the associational rights of the Party and its adherents by denying their right to nominate candidates, minor parties are expressly authorized to nominate candidates through a convention process under RCW 29A.20.121.

23. The State also affords minor political parties a mechanism to protect themselves from individuals or groups who attempt to hijack the party name or force an association with the minor political party. RCW 29A20.171(1) recognizes that there can be only one nominee of a minor political party. RCW 29A.20.171(2) provides for "a judicial determination of the right to the name of a minor political party." The Defendants intend to administer the State's partisan primary in a manner that denies the Party the right to nominate its candidates and control the use of its name. In doing so, the State protects the First Amendment right of association to minor political parties and their adherents while denying the same protection to the Party and its adherents.

DEMOCRATIC PARTY OF WASHINGTON V. REED

24. In *Reed*, the Ninth Circuit held that Washington cannot force a political party and its adherents to adulterate their nomination process. The *Reed* decision overturned Washington's blanket primary system, which -- like I-872 -- prevented the Party from controlling its own nomination process. The court, rejecting a litany of "compelling interests" advanced by the State to justify the invasion of political parties' First Amendment rights, stated that "[t]he remedy available to the Grangers and the people of the State of Washington for a party that nominates candidates carrying a message adverse to their interests is to vote for someone else, not to control whom the party's adherents select to carry their message." *Reed*, 343 F.3d at 1206-1207.

25. In *Jones*, the Supreme Court noted that forced political association violates the principles set forth in its earlier cases by forcing "political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." Jones, 530 U.S. at 577. The Supreme Court also noted that

> a corollary of the right to associate is the right not to associate. Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.

> In no area is the political association's right to exclude more important than in the process of selecting its nominee.

530 U.S. at 574-575. (citations and quotation marks omitted). The Ninth Circuit's *Reed* decision followed the Supreme Court's *Jones* decision. See *Reed* 343 F.3d at 1201.

26. There is no constitutionally significant difference between Washington's new "People's Choice" primary system and the previous blanket primary system, which was held unconstitutional by the Ninth Circuit. Indeed, the voter's pamphlet statement prepared by I-872's proponents stated that "I-872 will restore the kind of choice in the primary that voters enjoyed for seventy years with the blanket primary."

DEPRIVATION OF CIVIL RIGHTS BY STATE OFFICIALS UNDER COLOR OF LAW

27. The Party has adopted rules governing the nomination of its candidates and prohibiting candidates not qualified under Party rules to represent themselves as candidates of the Party. The Party has provided those rules to the County Auditors.

28. The conduct of any partisan primary by State officials through the County Auditors without implementation of an effective mechanism for the Party to exercise its right to limit participation in connection with that primary to adherents of the Party is action by those officials under law and color of law that deprives Plaintiffs of their civil rights.

29. If the County Auditors are permitted to conduct a "qualifying" partisan primary with multiple "Republican" candidates listed and not chosen by the Party, plaintiffs will be irreparably harmed by the denial of their First Amendment rights. Moreover, if the County Auditors conduct partisan primaries pursuant to procedures which are known to be unconstitutional, then there is a substantial risk that the results of those primaries will be invalid.

FIRST CAUSE OF ACTION: CONDUCTING AN INVALID PRIMARY

30. Plaintiffs reallege and incorporate by reference Paragraphs 1-29 above.

31. An actual controversy exists between Plaintiffs and Defendants with regard to the exercise of Plaintiffs' federally protected rights. Plaintiffs are entitled to declaratory judgment establishing the unconstitutionality of the State's primary system.

32. RCW 29A.04.127 and RCW 29A.52.112 are unconstitutional to the extent that they authorize the County Auditors to permit non-affiliates of the Party to participate in the Party's nominee selection process.

33. RCW 29A.04.127 and RCW 29A.52.112 are unconstitutional to the extent that they authorize the Secretary and County Auditors to facilitate cross-over voting and ticket-splitting by placing Republican primary races on the same ballot as primary races for other political parties or affiliations over the objection of the Party and

without requiring mechanisms to prevent voting in violation of the Party's associational rights.

34. Initiative 872 lacks a severability clause. Therefore, if any portion of I-872 is unconstitutional, the entire enactment is void.

35. Pursuant to 42 U.S.C. § 1983 *et seq.*, Plaintiffs are entitled to a declaratory judgment regarding their rights under the First Amendment and to their reasonable attorneys' fees and costs in this case.

SECOND CAUSE OF ACTION: FORCED ASSOCIATION

36. Plaintiffs reallege and incorporate by reference Paragraphs 1-35 above.

37. RCW 29A.24.030, RCW 29A.24.031 and RCW 29A.36.010 are unconstitutional under the First Amendment to the extent that they permit the State to compel the Party during a primary to publicly affiliate with candidates other than those who are qualified under Party rules to represent themselves as candidates of the Party.

38. The State's primary system, including RCW 29A.36.170, is unconstitutional under the First Amendment to the extent that it places upon the general election ballot as a candidate of the Party for any office the name of an individual who has been selected though a voting system that deprives the Party of the ability to limit participation in nominee selection to those the Party has determined should be included.

THIRD CAUSE OF ACTION: DENIAL OF EQUAL PROTECTION UNDER LAW

39. Plaintiffs reallege and incorporate by reference Paragraphs 1-38.

40. The State, through RCW 29A.20.171, protects minor political parties from forced association with candidates who may not share the goals or objectives of the minor political parties and their adherents. Through the convention process and the statutory procedures to resolve competing claims to the use of a minor political party's name, that party and its adherents may prevent misrepresentations of affiliation on primary ballots prepared by the Defendants. The State discriminates among political parties by providing a mechanism for minor political parties to protect themselves from forced affiliation with candidates, but denying the same right to the Party and its adherents under RCW 29A.24.030 and RCW 29A.24.031.

41. Plaintiffs are entitled to their reasonable attorneys' fees and costs in connection with this action pursuant to 42 U.S.C. § 1983 *et seq.*

SECOND FOURTH CAUSE OF ACTION: INJUNCTIVE RELIEF

42. Plaintiffs reallege and incorporate by reference Paragraphs 1-41 above.

43. There exists an imminent and ongoing threat by the County Auditors to deprive Plaintiffs of their civil rights by requiring Plaintiffs to select the candidates and nominees of the Party through a primary process in which Plaintiffs are not permitted

to exercise their First Amendment rights of association.

44. Plaintiffs will suffer irreparable injury if the Party's candidates and nominees are selected in a process in which the Party is deprived of its right to define participation.

45. Plaintiffs are entitled to preliminary and permanent injunctive relief restraining the County Auditors from:

a) conducting any partisan primary without affording the Party reasonable opportunity in advance of that primary to exercise its right to define participation in that primary;

b) conducting any partisan primary without implementing a reasonable mechanism to effectuate the Party's right to select the candidates who will carry the Party's name in that primary;

c) encouraging or facilitating, directly or indirectly, cross-over voting or ticket-splitting in connection with any partisan primary except to the extent expressly authorized by the Party for that primary; and

d) placing on a primary ballot the name of any candidate carrying the Party's name who is not qualified under the rules of the Party to stand for office as a candidate of the Party;

46. Plaintiffs are entitled to their reasonable attorneys' fees and costs in connection with this action pursuant to 42 U.S.C. § 1983 *et seq.*

PRAYER FOR RELIEF

Plaintiffs respectfully request the Court enter judgment:

1. Declaring RCW 29A.04.127 unconstitutional;

2. Declaring RCW 29A..24.030 and RCW 29A24.031 unconstitutional to the extent they authorize placing on a primary ballot the name of any candidate carrying the Party's name who is not qualified under the rules of the Party to stand for office as a candidate of the Party;

3. Declaring RCW 29A.36.010 unconstitutional;

4. Declaring RCW 29A.36.170 unconstitutional;

5. Declaring RCW 29A.52.112 unconstitutional;

6. Declaring Initiative 872 unconstitutional and declaring that the primary system in effect immediately before the passage of I-872 remains in effect;

7. Permanently restraining the County Auditors and all those acting in active concert and participation with them from:

a) conducting any partisan primary without affording the Party reasonable opportunity in advance of that primary to exercise its right to define participation in that primary;

b) conducting any partisan primary without implementing a reasonable mechanism to

effectuate the right to select the candidates who will carry the Party's name in that primary;

c) encouraging or facilitating, directly or indirectly, cross-over voting or ticket-splitting in connection with any partisan primary except to the extent expressly authorized by the Party for that primary; and

d) placing on a primary ballot the name of any candidate carrying the Party's name who is not qualified under the rules of the Party to stand for office as a candidate of the Party.

8. Awarding Plaintiffs their reasonable attorneys' fees and costs; and

9. Granting such further relief as the Court deems appropriate.

DATED this 19th day of May, 2005.

LIVENGOOD, FITZGERALD
& ALSKOG, PLLC

John J. White, Jr.

By: _____
John J. White, Jr., WSBA #13682
Kevin B. Hansen, WSBA #28349
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; and MICHAEL YOUNG, Plaintiffs, and WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; and PAUL BERENDT, Plaintiffs in Intervention, v. DEAN LOGAN, King County Records & Elections Division Manager; BOB TERWILLIGER, Snohomish County Auditor; VICKY DALTON, Spokane County Auditor; GREG KIMSEY, Clark County Auditor; CHRISTINA SWANSON, Cowlitz County Auditor; VERN SPATZ, Grays Harbor County Auditor; PAT GARDNER, Pacific County Auditor; DIANE L. TISCHER, Wahkiakum County Auditor; and DONNA M. ELDRIDGE, Jefferson County Auditor, Defendants,	No: C05 0927 WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S MOTION TO INTERVENE AS PLAINTIFF **Noted for Consideration: June 3, 2005**

Pursuant to Fed.R.Civ.P. 24(a) and (b), the Washington State Democratic Central Committee

(the "Party") and its Chair, Paul Berendt, move to intervene in the above-entitled action.

This lawsuit seeks a declaration that Washington's "top two" primary statute unconstitutionally impairs the First Amendment associational rights of political parties to decide for themselves who may represent them in partisan elections. As a practical matter, this suit will determine the scope of the Washington Democratic Central Committee's associational rights to select its own candidates for public office. Therefore, the Party has a fundamental interest in the outcome of this case and is entitled to intervene as of right. Fed.R.Civ.P. 24(a) (Intervention of Right allowed when the movant "claims an interest relating to the ... subject of the action" and the "disposition of the action may as a practical matter impair or impede his ability to protect that interest[.]"); *see also Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (Rule 24(a) construed broadly and in favor of applicants); *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993) (whether movant has an adequate interest in the action is a "practical, threshold inquiry."). As the Advisory Committee Notes to Fed.R.Civ.P. 24(a) make clear: "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene."

Alternatively, the Washington State Democratic Central Committee is similarly situated with plaintiff the Washington State Republican Party. The Party therefore has claims against the defendants that share common questions of law and

fact. The Court should allow permissive intervention pursuant to Fed.R.Civ.P. 24(b) (Permissive Intervention allowed when the movant's "claim or defense and the main action have a question of law or fact in common.").

Counsel for the Plaintiff in Intervention has conferred with Plaintiff, the Washington State Republican Party, through its counsel. The Plaintiff has indicated that they will have no opposition to the Motion to Intervene. We respectfully request that the Court allow the Washington State Democratic Central Committee and its Chair, Paul Berendt, to Intervene and represent their interests in this matter.

We have attached herewith a Complaint in Intervention as Exhibit A. We request that the Complaint in Intervention be accepted for filing and service on the other parties to this action. This Complaint substantially mirrors the Complaint already on file.

DATED this 19th day of May, 2005.

PRESTON GATES & ELLIS LLP

David T. McDonald

By _____

David T. McDonald, WSBA #5260
Jay Carlson, WSBA # 30411
Attorneys for Plaintiffs in Intervention,
Washington State Democratic
Party and Paul R. Berendt, Chair

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; and MICHAEL YOUNG,

Plaintiffs,

and

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; and PAUL BERENDT,

Plaintiffs in Intervention,

v.

DEAN LOGAN, King County Records & Elections Division Manager; BOB TERWILLIGER, Snohomish County Auditor; VICKY DALTON, Spokane County Auditor; GREG KIMSEY, Clark County Auditor; CHRISTINA SWANSON, Cowlitz County Auditor; VERN SPATZ, Grays Harbor County Auditor; PAT GARDNER, Pacific County Auditor; DIANE L. TISCHER, Wahkiakum County Auditor; and DONNA M. ELDRIDGE, Jefferson County Auditor,

Defendants,

No: C05 0927

COMPLAINT IN INTERVENTION FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF REGARDING INITIATIVE 872 AND PRIMARY ELECTIONS

NATURE OF ACTION

1. The First and Fourteenth Amendments to the United States Constitution guarantee the right of individuals to associate in a political party, the right of that party to select its nominees for partisan political office, and the right of the individuals and their party to limit participation in the process of selecting nominees to those voters the party identifies as sharing its interests and persuasions. As the Ninth Circuit noted in striking down Washington's blanket primary, "... the Washington statutory scheme prevents those voters who share their affiliation from selecting their party's nominees. The right of people adhering to a political party to freely associate is not limited to getting together for cocktails and canapés. Party adherents are entitled to associate to choose their party's nominees for public office." *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1204 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213 (2004) ("*Reed*").

2. One of the fundamental purposes of the First Amendment is to provide for and promote competition between ideas in American civilization. This purpose is advanced by requiring that the selection of a political party's candidates and nominees be done by adherents of the party rather than by those opposed to or indifferent to the party.

3. The State of Washington (the "State") has enacted Initiative 872, attempting to prevent the Washington State Democratic Party (the "Party") and its adherents from selecting their nominees, and to force the Party to be associated publicly with candidates who have not been nominated by the

Party, who will alter the political message and agenda the Party seeks to advance, and who will confuse the voting public with respect to what the Party and its adherents stand for. The State seeks to appropriate the use of the Democratic Party's name in primaries and general elections in order to protect the political interests of the incumbent and the well-known at the expense of the committed and the innovative. Acting under color of law, State and local officials force the Party and its adherents to include supporters of other parties and political interests in determining which, or whether any, candidate will carry the Democratic Party name in the general election.

4. Initiative 872, as set forth in both Section 2 ("In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective....") and Section 18, was expressly intended to defeat the constitutional right of the Party and its adherents to nominate candidates, recognized by the U.S. Supreme Court in *California Democratic Party v. Jones*, 530 U.S. 567, 120 S.Ct. 2402, 147 L. Ed. 2d 502 (2000) and *Reed*. The Initiative, as implemented by State officials, eliminates mechanisms previously enacted by the State to protect the First Amendment rights of the Party and its adherents and provides no effective substitute mechanism for the Party to exercise its right to limit participation in the nomination process and thereby protect its adherents' right of association from forced dilution.

5. This is an action to protect the First Amendment rights of the Party and its adherents to advocate and promote their vision for the future

without subtle or overt censorship or interference by the State through the County Auditors acting under color of the laws of the State of Washington. Initiative 872 is unconstitutional.

JURISDICTION AND VENUE

6. Plaintiffs' rights of political association and political expression are guaranteed against abridgement by the State and those acting under color of its laws by the First and Fourteenth Amendments to the United States Constitution and by 42 U.S.C. § 1983. This case presents a federal question involving federally-protected rights, including freedom of association and protection against state intervention into the association rights of the Party and its adherents, set out in *Reed*. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331, 1343(a)(3), 2201 and 2202.

7. Defendants reside in the Western District of the State of Washington (the "Western District") and the conduct and threatened conduct that gives rise to Plaintiffs' claims substantially occurred and threatens to occur within the Western District. Venue for this action lies within the Western District pursuant to 28 U.S.C. §§ 1391(a) and 1391(b).

PARTIES

Plaintiffs

8. The Party is a "major political party" as defined in RCW 29A.04.086 and is organized for the purposes of promoting the political beliefs of its adherents, selecting and supporting candidates who support the political beliefs of the Party's adherents

and electing public officials who will conduct government affairs in a manner consistent with the Party's philosophy. The Party has all the powers inherent in a political organization and is empowered to perform all functions inherent in a political party.

9. Intervenor-Plaintiff Paul Berendt is a resident of the Western District. He is the elected Chairman of the Washington State Democratic Central Committee, the governing body of the Party pursuant to its Charter, and is the political and administrative head of the Party pursuant to its Charter and Bylaws and RCW 29A.80.020, *et seq.*

10. Defendant Dean Logan, King County Records & Elections Division Manager and Bob Terwilliger, Snohomish County Auditor, Vicky Dalton, Spokane County Auditor, Greg Kimsey, Clark County Auditor, Christina Swanson, Cowlitz County Auditor, Vern Spatz, Grays Harbor County Auditor, Pat Gardner, Pacific County Auditor and Diane L. Tischer, Wahkiakum County Auditor (the "County Auditors") are election officers in the State, having the overall responsibility under RCW 29A.04.025 to conduct primary elections within their respective counties, of primary elections and are responsible, consistent with the rules established by the Secretary, to provide and tabulate ballots for such elections. The County Auditors, except Vicky Dalton, reside in the Western District of Washington.

WASHINGTON'S PARTISAN PRIMARY

11. The Defendants will administer partisan primaries this September. Pursuant to the laws of the State, including RCW 29A.04.311,

29A.20.121, and 29A.52.116, the Party is required to advance its candidates for Congressional, State and County offices by means of partisan political primaries administered by the Secretary of State ("the Secretary") and the County Auditors. RCW 29A.52.116 states: "Major political party candidates for all partisan elected offices, except for president and vice-president ... must be nominated at primaries held under this chapter." The mandatory notice of the primary must contain "the proper party designation" of each candidate in the primary. RCW 29A.52.311. RCW 29A.52.112, adopted by I-872, requires that "For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots ...." The same statute also provides that the "top two" vote-getters in the primary will advance to the general election. The Secretary has asserted that only the two candidates who receive the most votes will on primary day will advance to the primary even if both candidates are associated with the same political party. Defendants Logan and Terwilliger have each asserted, "At this time, I am not aware of any language associated with the Initiative that contemplates a partisan nomination process separate from the primary."

12. Neither the laws of the State nor the rules adopted or proposed by the Secretary provide any mechanism for the Party to effectively exercise its right of association in connection with the partisan primary in which it is forced by State law to participate. Any individual may appropriate the

Party's name, regardless of whether the Party desires affiliation with that person.

13. The State, through its filing statute, compels the Party to associate with any person who files a declaration of candidacy expressing a "preference" for the Party, regardless whether the Party desires association with the person.

14. In addition to requiring the Party to accept as its candidate any individual without regard to the individual's political philosophy or participation in Party affairs, RCW 29A.04.127 forces the Party to permit any voter to participate in selection of the Party's standard-bearer without regard to the voter's partisan affiliation or beliefs. The State thus forces the Party and its adherents to associate with those who do not share their beliefs or are openly antagonistic to them. Initiative 872 was intended to establish *a de facto* blanket primary in response to a declaration that the blanket primary is unconstitutional and to facilitate cross-over and ticket-splitting voting, thus depriving the Party of its right to prevent supporters of other political parties and interests from participating in its candidate selection and nomination processes. It was intended to force the Party to modify its message or have a modified message forced upon it by the simple expedient of eliminating the Party's selected spokesperson in favor of a spokesperson selected by non-adherents of the Party. The sponsors' official statement in support of the Initiative states, "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." This attempt at forced message modification was rejected as a legitimate state interest by both

the Supreme Court in *Jones* and the Ninth Circuit in *Reed*.

15. The other interests asserted as the basis for adopting I-872, codified as RCW 29A.04.206, were also rejected in *Reed* as legitimate grounds for invading the right of political association.

16. The Party and its adherents are irreparably injured by the forced adulteration of the Party's nomination process, by the State's active encouragement of cross-over and ticket-splitting, and by the resulting dilution and potential suppression of its message. The presence and participation of non-party voters in the partisan primary inevitably alters candidates' messages and actions and thereby dilutes the Party's message and influence. Dilution of the Party's vote in any partisan primary carries with it the risk that the Party will be denied a place on the general election ballot to the extent that only the "top two" vote-getters will appear on the general election ballot. For example, if seven candidates carrying the Party name each receive 10% of the vote at a partisan primary, and two candidates of other parties each receive 15%, the Secretary maintains there would be no Party candidate on the general election ballot, despite the receipt by candidates with the Party's identification or 70% of the total vote.

DENIAL OF EQUAL PROTECTION OF LAWS

17. In contrast to its invasion of the associational rights of the Party, by denying a right to nominate candidates, the State expressly authorizes minor parties to nominate candidates through a convention process. RCW 29A.20.121

provides, "Any nomination of a candidate for partisan public office by other than a major political party may be made only in a convention ...." (internal punctuation omitted).

18. The State also affords minor political parties a mechanism to protect themselves from individuals or groups who attempt to hijack the party name or force an association with the minor political party. RCW 29A20.171(1) recognizes that there can be only one nominee of a minor political party. RCW 29A.20.171(2) provides for "a judicial determination of the right to the name of a minor political party ...." The Defendants intend to administer the State's partisan primary in a manner that denies the Party the right to nominate its candidates and the right to its name. In doing so, the State improperly protects the First Amendment right of association to minor political parties and their adherents, but denies the same protection to Plaintiffs.

DEMOCRATIC PARTY OF WASHINGTON V. REED

19. In *Reed*, the Ninth Circuit held that Washington cannot force a political party and its adherents to adulterate their nomination process. The *Reed* decision overturned Washington's blanket primary system, which -- like I-872 -- prevented the Party from controlling its own nomination process. The court, rejecting a litany of "compelling interests" advanced by the State to justify the invasion of First Amendment rights, stated that "[t]he remedy available to the Grangers and the people of the State of Washington for a party that nominates candidates

carrying a message adverse to their interests is to vote for someone else, not to control whom the party's adherents select to carry their message." *Reed*, 343 F.3d at 1206-1207.

20. In *Jones*, the Supreme Court noted that forced political association violates the principles set forth in earlier cases, by forcing "political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." 530 U.S. at 577. The Supreme Court also noted that "a corollary of the right to associate is the right not to associate. 'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.' In no area is the political association's right to exclude more important than in the process of selecting its nominee." 530 U.S. at 574-575 (citations omitted). The Ninth Circuit decision followed the U.S. Supreme Court decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). *Reed*, 343 F.3d at 1201.

21. There is no constitutionally significant difference between Washington's previous blanket primary system held unconstitutional by the Ninth Circuit and the "People's Choice" primary system. Indeed, the voter's pamphlet statement prepared by I-872's proponents stated that "I-872 will restore the kind of choice in the primary that voters enjoyed for seventy years with the blanket primary."

DEPRIVATION OF CIVIL RIGHTS BY STATE OFFICIALS UNDER COLOR OF LAW

22. The Washington State Democratic Central Committee has adopted rules governing the nomination of its candidates and prohibiting candidates not qualified under Party rule to represent themselves as candidates or the Party. The Party has provided those rules to the Defendants.

23. The conduct of any partisan primary by State officials without implementation of an effective mechanism for the Party to exercise its right to limit participation in connection with that primary to adherents of the Party is action by those State officials under law and color of law that deprives Plaintiffs of their civil rights.

24. If the County Auditors are permitted to conduct a "qualifying" partisan primary with multiple "Democratic" candidates listed and not chosen by the Party, plaintiffs will be denied their First Amendment rights and will be irreparably injured. Moreover, if the State conducts partisan primaries pursuant to procedures which are known to be unconstitutional, then there is a substantial risk that the results of those primaries will be invalid.

FIRST CAUSE OF ACTION: CONDUCTING AN INVALID PRIMARY

25. Plaintiffs reallege and incorporate by reference Paragraphs 1-24.

26. An actual controversy exists between Plaintiffs and Defendants with regard to the exercise of Plaintiffs' federally protected rights. Plaintiffs are entitled to declaratory judgment establishing the unconstitutionality of the State's primary system.

27. RCW 29A.04.127 and RCW 29A.52.112 are unconstitutional to the extent that they authorize the County Auditors to permit non-affiliates of the Party to participate in the Party's nominee selection process.

28. RCW 29A.04.127 and RCW 29A.52.112 are unconstitutional to the extent that they authorize the Secretary and County Auditors to facilitate cross-over voting and ticket-splitting by placing Democratic primary races on the same ballot as primary races for other political parties or affiliations over the objection of the Party and without requiring mechanisms to prevent voting in violation of the Party's associational rights.

29. Initiative 872 lacks a severability clause. Therefore, if any portion of I-872 is unconstitutional, the entire enactment is void.

30. Pursuant to 42 U.S.C. § 1983, *et seq.*, Plaintiffs are entitled to a declaratory judgment regarding their rights under the First Amendment and to their reasonable attorneys' fees and costs in this case.

SECOND CAUSE OF ACTION: FORCED ASSOCIATION

31. Plaintiffs reallege and incorporate by reference Paragraphs 1-30.

32. RCW 29A.24.030, RCW 29A.24.031 and RCW 29A.36.010 are unconstitutional under the First Amendment to the extent that they permit the State to compel the Party during a primary to publicly affiliate with candidates other than those who are qualified under Party rules to represent themselves as candidates of the Party.

33. The State's primary system, including RCW 29A.36.170, is unconstitutional under the First Amendment to the extent that it places upon the general election ballot as a candidate of the Party for any office the name of an individual who has been selected though a voting system that deprives the Party of the ability to limit participation in nominee selection to those the Party has determined should be included.

THIRD CAUSE OF ACTION: DENIAL OF EQUAL PROTECTION UNDER LAW

34. Plaintiffs reallege and incorporate by reference Paragraphs 1-33.

35. The State, through RCW 29A.20.171, provides protection for minor political parties from forced association with candidates who may not share the goals or objectives of the minor political party and its adherents. Through the convention process and the statutory procedures to resolve competing claims to the use of a minor political party's name, those parties and their adherents may prevent misrepresentations of affiliation on primary ballots prepared by the Defendants. The State discriminates among political parties by providing a mechanism for minor political parties to protect themselves from forced affiliation with candidates,

but denying the same right to the Party and its adherents under RCW 29A.24.030 and RCW 29A.24.031 by permitting any person to represent himself or herself as a candidate of the Party.

36. Plaintiffs are entitled to their reasonable attorneys' fees and costs in connection with this action pursuant to 42 U.S.C. § 1983, *et seq.*

FOURTH CAUSE OF ACTION: INJUNCTIVE RELIEF

37. Plaintiffs reallege and incorporate by reference Paragraphs 1-36.

38. There exists an imminent and ongoing threat by State officials to deprive Plaintiffs of their civil rights by requiring Plaintiffs to select the candidates and nominees of the Party through a primary process in which Plaintiffs are not permitted to exercise their First Amendment rights of association and exclusion.

39. Plaintiffs will suffer irreparable injury if the Party's candidates and nominees are selected in a process in which the Party is deprived of its right to define participation.

40. Plaintiffs are entitled to preliminary and permanent injunctive relief restraining State officials from:

a) conducting any partisan primary without affording the Party reasonable opportunity in advance of that primary to exercise its right to define participation in that primary;

b) conducting any partisan primary without implementing a reasonable mechanism to effectuate the Party's exercise of its right to select the candidates who participate in that primary associated with the Party's name;

c) encouraging or facilitating, directly or indirectly, cross-over voting or ticket-splitting in connection with any partisan primary except to the extent expressly authorized by the Party for that primary;

d) placing on a primary ballot the name of any candidate in association with the Party who has not qualified under the rules of the Party to stand for office as a candidate of the Party.

41. Plaintiffs are entitled to their reasonable attorneys' fees and costs in connection with this action pursuant to 42 U.S.C. § 1983, *et seq.*

PRAYER FOR RELIEF

Plaintiffs respectfully request the Court enter judgment:

1. Declaring RCW 29A.04.127 unconstitutional;

2. Declaring RCW 29A..24.030 and RCW 29A24.031 unconstitutional to the extent they authorize placing on a primary ballot the name of any candidate in association with the Party who has not qualified under the rules of the Party to stand for office as a candidate of the Party;

3. Declaring RCW 29A.36.010 unconstitutional;

4. Declaring RCW 29A.36.170 unconstitutional;

5. Declaring RCW 29A.52.112 unconstitutional;

6. Declaring Initiative 872 unconstitutional and declaring that the primary system in effect immediately before the passage of I-872 remains in effect;

7. Permanently restraining the County Auditors and all those acting in active concert and participation with them from:

a) conducting any partisan primary without affording the Party reasonable opportunity in advance of that primary to exercise its right to define participation in that primary;

b) conducting any partisan primary without implementing a reasonable mechanism to effectuate the Party's exercise of its right to select the candidates who participate in that primary associated with the Party's name;

c) encouraging or facilitating, directly or indirectly, cross-over voting or ticket-splitting in connection with any partisan primary except to the extent expressly authorized by the Party for that primary;

d) placing on a primary ballot the name of any candidate in association with the Party who has not qualified under the rules of the Party to stand for office as a candidate of the Party.

8. Awarding Plaintiffs their reasonable attorneys' fees and costs; and

9. Granting such further relief as the Court deems appropriate.

DATED this ____ day of June, 2005.

PRESTON GATES & ELLIS LLP

By David T. Mcdonald
David T. McDonald, WSBA #5260
Jay Carlson, WSBA # 30411
Attorneys for Plaintiffs in Intervention, Washington State Democratic Party and Paul R. Berendt, Chair

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, CHRISTOPHER VANCE, BERTABELLE HUBKA, STEVE NEIGHBORS, BRENT BOGER, MARY COLLINS, MICHAEL YOUNG,

Plaintiffs,

v.

DEAN LOGAN, King County Records & Elections Division Manager; BOB TERWILLIGER, Snohomish County Auditor; VICKY DALTON, Spokane County Auditor, GREG KIMSEY, Clark County Auditor, CHRISTINA SWANSON, Cowlitz County Auditor, VERN SPATZ, Grays Harbor County Auditor, PAT GARDNER, Pacific County Auditor, DIANE L. TISCHER, Wahkiakum County Auditor, DONNA ELDRIDGE, Jefferson County Auditor,

Defendants,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, PAUL BERENDT,

Proposed Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, RUTH BENNETT and J. S. MILLS,

Proposed Intervenors.

Case No: CV05-0927

MOTION TO INTERVENE

NOTE ON MOTION CALENDAR:

June 10, 2005

Pursuant to Fed.R.Civ.P. 24(a), the Libertarian Party of Washington State (the "LP"), its Chair, Ruth Bennett, and a member, J.S. Mills, move to intervene in the above-entitled action.

The Libertarian Party has a claim against the above named defendants involving the same core of facts and questions of law as in the original action by the Plaintiffs. This motion is not brought for improper purpose, and will not unduly prejudice the current parties to this action. The substance of the Libertarian Party's claim is outlined in the proposed Complaint to Intervene, attached to this Motion.

The underlying lawsuit seeks a declaration that Initiative 872, Washington's new primary system, unconstitutionally impairs the associational rights of political parties to decide who may represent them in elections for partisan office. This suit will determine the scope of the LP's associational rights to select its own candidates for public office. Therefore, the LP has a fundamental interest in the outcome of this case and is entitled to intervene as of right.

Although the LP shares many of the same First Amendment claims and rights in this suit with the Plaintiffs and the other Plaintiffs in Intervention, the LP has distinct but nonetheless inextricably related Fourteenth Amendment claims and rights. The LP is a "minor" political party under Washington law and is thus entitled to different considerations regarding access to the general

election ballot. This suit may determine whether a state may limit access to the general election to only two candidates, thus virtually eliminating access to the general election ballot for third party and independent candidates, and possibly resulting in expenditure of public funds to accomplish the private purposes of the major political parties.

Counsel for the Plaintiff in Intervention has conferred with the Plaintiffs and the other Plaintiffs in Intervention, but has not conferred with the Defendants to this action. Nonetheless this counsel anticipates no opposition to this Motion to Intervene. We respectfully request that the Court allow the Libertarian Party of Washington State (the "LP"), its Chair, Ruth Bennett, and a member, J.S. Mills, to Intervene and represent their interests in this matter.

Fed.R.Civ.P. 24(a) (Intervention of Right allowed when the movant "claims an interest relating to the ... subject of the action" and the "disposition of the action may as a practical matter impair or impede his ability to protect that interest..."); see also, *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995) (Rule 24(a) construed broadly and in favor of applicants); *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993) (whether movant has an adequate interest in the action is a "practical, threshold inquiry.").

We have attached hereto a Complaint to Intervene. (Exhibit A) We request that the

Complaint be accepted for filing and service on the other parties to this action.

DATED Thursday, May 19, 2005, at Tacoma, Washington.

SHEPARD LAW OFFICE, INC.,

Richard Shepard

RICHARD SHEPARD, WSBA # 16194
Attorney for Proposed Intervenors
LIBERTARIAN PARTY OF
WASHINGTON STATE, RUTH
BENNETT, and J. S. MILLS

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, CHRISTOPHER VANCE, BERTABELLE HUBKA, STEVE NEIGHBORS, BRENT BOGER, MARY COLLINS, MICHAEL YOUNG,

Plaintiffs,

v.

DEAN LOGAN, King County Records & Elections Division Manager; BOB TERWILLIGER, Snohomish County Auditor; VICKY DALTON, Spokane County Auditor, GREG KIMSEY, Clark County Auditor, CHRISTINA SWANSON, Cowlitz County Auditor, VERN SPATZ, Grays Harbor County Auditor, PAT GARDNER, Pacific County Auditor, DIANE L. TISCHER, Wahkiakum County Auditor, DONNA ELDRIDGE, Jefferson County Auditor,

Defendants,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, PAUL BERENDT,

Proposed Interveners,

LIBERTARIAN PARTY OF WASHINGTON STATE, RUTH BENNETT and J. S. MILLS,

Proposed Interveners.

Case No: CV05-0927

[Proposed]

LIBERTARIAN PARTY'S COMPLAINT TO INTERVENE FOR DECLARATORY JUDGMENT AND OTHER RELIEF

SUMMARY OF ACTION

This is an action to protect the First and Fourteenth Amendment rights of the LP and its adherents to assure access to the general election ballot for their nominated candidates and to advocate and promote their vision for the future without subtle or overt censorship or interference by the State through the County Auditors acting under color of the laws of the State of Washington. Initiative 872, the subject of challenge, is unconstitutional.

The Libertarian Party of Washington State ("the LP") seeks to intervene in the above entitled action to ensure its interests are properly and timely represented to this court. Initiative 872, adopted by Washington State voters in November 2004, was expressly intended to defeat the constitutional right of the LP and its adherents to nominate candidates without outside interference as recognized in *California Democratic Party v. Jones* 530 U.S. 567, 120 S.Ct. 2402, 147 L. Ed. 2d 502 (2000)(*"Jones"*) and *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1204 (9th Cir. 2003) *cert. denied* 540 U.S. 1213 (2004) (*"Reed"*). I-872 accomplishes this by claiming that the primary does not "nominate" candidates, but rather "qualifies" them for the general election ballot. However, the partisan nature of the primary remains under I-872 and the political parties are deprived of their rights to nominate their own standard bearers.

Consequently I-872 deprives the LP of its ability to determine the political message it wishes to bring to the voters and further adds to voter

confusion by removing assurances that the LP label actually means something. I-872 thus violates the LP's First Amendment rights of expressive association and ultimately impoverishes the guarantees afforded by the First Amendment to the voters.

More specifically, emergency rules implemented by the Washington Secretary of State on May 18, 2005, allegedly to implement I-872, administratively "repeal" statutes expressly authorizing the LP to nominate its candidates by way of convention. Moreover, I-872 allows any candidate regardless of the nature of his/her relationship to the LP or its philosophy to use the "Libertarian" label when running for office.

Further, by allowing only two candidates to appear on the general election ballot I-872 erects a constitutionally impermissible standard for minor party and independent candidate access to the general election ballot. I-872 thus violates the LP's Fourteenth Amendment right to access to the general election ballot.

COMPLAINT

PARTIES

1. The Libertarian Party of Washington State ("the LP") is a political party organized in 1972 for the purposes of promoting the political beliefs of its members, electing public officers who are members of the Libertarian Party, and in advocating principles and policies for operation of government affairs consistent with the libertarian philosophy.

2. Ruth Bennett is a resident of the Western District of Washington and is Chair of the Libertarian Party of Washington State, elected pursuant to its Constitution and Bylaws. Ms. Bennett is the former Libertarian candidate for governor in the 2004 election and a qualified elector within the state of Washington.

3. J.S. Mills is a resident of the Western District of Washington and a member of the Libertarian Party. Mr. Mills is a former Chair of the Libertarian Party of Washington State, a former Libertarian candidate for U.S. Senator in the 2004 election, a likely candidate for U.S. Senator in the 2006 election and a qualified elector within the state of Washington.

4. Defendant Dean Logan, King County Records & Elections Division Manager and Bob Terwilliger, Snohomish County Auditor, Vicky Dalton, Spokane County Auditor, Greg Kimsey, Clark County Auditor, Christina Swanson, Cowlitz County Auditor, Vern Spatz, Grays Harbor County Auditor, Pat Gardner, Pacific County Auditor, Diane L. Tischer, Wahkiakum County Auditor and Donna Eldridge, Jefferson County Auditor, (the "County Auditors") are election officers in the State, having the overall responsibility under RCW 29A.04.025 to conduct primary elections within their respective counties, of primary elections and are responsible, consistent with the rules established by the Secretary, to provide and tabulate ballots for such elections.

The County Auditors, except Vicky Dalton, reside in the Western District of Washington. Ms. Dalton resides in the Eastern District.

JURISDICTION AND VENUE

5. This case presents a federal question related to the federal constitutional rights of persons residing within the Western District and other parts of Washington. This court has jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

6. Venue properly lays before this court under 28 U.S.C. § 1391.

FACTS

7. The First and Fourteenth Amendments of the United States Constitution guarantee individuals the right to associate in a political party, the right of a party to select its nominees for public office, the right of a party to determine the basis of selection and the right, upon a minimal showing of support, of access to the general election ballot.

8. Initiative 872, as set forth in both Section 2 ("In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective....") and Section 18, was expressly intended to defeat the constitutional right of the LP and its adherents to nominate candidates, recognized by the U.S. Supreme Court in *Jones, supra,* and *Reed, supra.*

9. Under Initiative 872, as interpreted by the Secretary of State and implemented by the

County Auditors, the primary is the only means by which the LP can advance its candidates to the general election ballot. However, RCW 29A.52.112, adopted under I-872, states: "For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots ...." The same statute also provides that the "top two" candidates receiving the most votes will advance to the general election. The Secretary has asserted that this means the top two candidates advance whether or not they are the same political party.

10. I-872 was intended to force the LP to modify its message. The sponsors' official statement in support of the Initiative states, "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." This attempt at forced message modification was rejected as a legitimate state interest by both the Supreme Court in *Jones* and the Ninth Circuit in *Reed*.

11. There is no material First Amendment difference between Initiative 872 and Washington's previous blanket primary system held unconstitutional by the Ninth Circuit. Indeed, the voter's pamphlet statement prepared by I-872's proponents stated "I-872 will restore the kind of choice in the primary that voters enjoyed for seventy years with the blanket primary."

12. Initiative 872 was explicitly intended to re-establish a partisan primary that facilitates cross-over and ticket-splitting voting, much like the "blanket primary" invalidated in *Reed*. While the circumstances of a particular election cycle may recommend cross-over votes or ticket splitting to the LP, the right to choose whether to allow it is a clear First Amendment right reserved to the LP. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514, (1986), *Beaver v. Clingman*, 363 F.3d 1048, 120 A.L.R.5th 707 (10th Cir. 2004), *cert. granted*, 125 S.Ct. 27, 159 L.Ed.2d 857, (NO. 04-37). By limiting the choices of the LP to include or exclude voters the state is depriving the LP of its First Amendment right to determine the basis of its participation in the election process.

13. Other interests asserted as the basis for adopting I-872, codified as RCW 29A.04.206, are not legitimate grounds for invading the right of political association. See, *Reed*.

14. RCW 29A.04.127 forces the LP to permit any voter to participate in selection of the LP's standard-bearer without regard to the voter's partisan affiliation or beliefs, and without the LP's permission. The State forces the LP and its adherents, without option, to associate with those who may not share their beliefs or may be antagonistic to them.

15. Historically (except for the 2002 and 2004 elections) the LP has nominated its candidates by convention as provided by prior state law.

However, on May 18, 2005, the Secretary of State adopted emergency rules allegedly to implement I-872 that effectively preempted and eliminated existing statutory mechanisms (R.C.W. §§ 29A.20.110 through 29A.20.201) for the LP to exercise its right to nominate its candidates by convention, WAC 434-215-015.

16. I-872 contained a repealer section. But R.C.W. §§29A.20.110 through 29A.20.201 were not repealed by I-872, and remain valid law. The LP's right to nominate by convention was expressly recognized by the State in the blanket primary litigation, see the trial court pleadings in *Reed, supra,* as a device to help the LP protect its message from dilution and/or disbursal of voter support.

17. The Initiative, as implemented by State officials, eliminates mechanisms previously enacted by the State to protect the First Amendment rights of the LP and its adherents and provides no effective substitute mechanism for the LP to exercise its right to limit participation in the nomination process and thereby protect its adherents' right of association from forced dilution.

18. Because the LP is smaller and not as likely to run as many candidates as the Democratic or Republican Parties, the candidacy of an "imposter" (non-member candidate running under the Libertarian banner) or "renegade" (member of the LP running under the LP banner but without compliance with internal LP nomination rules) in a highly publicized

race could result in not only dilution or suppression of the LP message, but in wholesale redefinition of the message. I-872 provides no mechanism to protect the identity of the LP or its message and opens the door to confusion among the voters as to what the LP stands for.

19. Neither the laws of the State nor the rules adopted or proposed by the Secretary provide any mechanism for the LP to effectively exercise its right of association in connection with the partisan primary in which it is forced by State law to participate. Any individual candidate may appropriate the LP's name, regardless of whether the LP desires affiliation with that person.

20. I-872 deprives the LP of its proprietary right to the use of the party name, thus leading to voter confusion regarding which candidate(s) are speaking for the party and which are imposters or renegades appropriating the party name for their own purposes. The name "Libertarian Party" is a nationally trademarked name and therefore may be used by candidates only with LP consent.

21. The risk of imposter or renegade candidates also increases the risk of splintered parties and unrestrained factionalism, which interest the US Supreme Court has deemed compelling enough to justify denying an otherwise qualified candidate a place on the general election ballot. *Storer v. Brown*, 415 U.S. 724 (U.S., 1974). There is no logical reason why an

interest articulated by a state and recognized by the Supreme Court as a compelling interest, should suddenly lose its compelling character because a political party articulates the same interest.

22. The Libertarian Party of Washington State has adopted rules governing the nomination of its candidates and prohibiting persons who are not members of the LP from indicating an affiliation with the LP when declaring a candidacy for public office.

23. The conduct of any partisan primary by State officials without implementation of an effective mechanism for the LP to exercise its right to determine participation in connection with that primary according to the rules of the LP is an action by those State officials under law and color of law that deprives Plaintiffs of their civil rights.

24. The State, through its filing statute, compels the LP to associate with any person who files a declaration of candidacy expressing a "preference" for the LP, regardless whether the LP desires association with the person or believes that person best articulates the LP's chosen temporal message for that election cycle. The LP and its adherents are irreparably injured by the forced adulteration of the LP's nomination process and the risk of diluted or disbursed support for the LP message.

25. Dilution and/or dispersal of the LP vote in any partisan primary carries with it the risk that

no LP candidate will obtain enough votes to advance to the general election ballot. For example, if six candidates carrying the LP name each receive 10% of the vote at a partisan primary, and one candidate of each of the other parties receives 20%, the Secretary maintains there would be no LP candidate on the general election ballot, despite the receipt by LP candidates of 60% of the total vote.

26. The Fourteenth Amendment equal protection and due process clauses guarantee reasonable access for minor party and independent candidates to the general election ballot. "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." *Williams v. Rhodes*, 393 U.S. 23, 31, 89 S.Ct. 5, 11 (1968).

27. "States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office." *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S.Ct. 533, 536 (1986), but no state may require a minor party or independent candidate to show support of more than 5% of the voters to be placed on the general election ballot. Compare, *Rhodes, supra*, to *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554

(1971). I-872 requires the minor party or independent candidate to receive at least the second highest number of votes to advance to the general election ballot, a threshold that amounts to a moving target, dependent on the number of candidates for a particular office as well as other variables completely outside the minor party or independent candidate's control. This threshold is thus arbitrary and a denial of due process rights for LP candidates.

FIRST CAUSE OF ACTION: DECLARATORY JUDGMENT

28. Plaintiffs reallege and incorporate by reference Paragraphs 1-27.

29. An actual controversy exists between Plaintiffs in Intervention and Defendants regarding federally protected rights. Plaintiffs are entitled to declaratory judgment establishing the unconstitutionality of the State's primary system.

30. R.C.W. § 29A.24.031 and newly promulgated WAC 434-215-015 are unconstitutional to the extent they, or either of them, allow any person who wishes to be a candidate to appropriate the Libertarian Party label without compliance with the LP nomination rules.

31. R.C.W. §§29A.20.110 through 29A.20.201 were not repealed by I-872, and remain valid law. The Secretary of State was not entitled to override them by emergency rule.

32. The LP is constitutionally entitled to nominate its standard bearers for election to public office by convention and/or caucus without substantive interference from the State and/or the Defendant County Auditors.

33. Initiative 872 is unconstitutional to the extent it deprives the LP of the right to determine who may participate in the nomination of its standard bearers.

34. Initiative 872 is unconstitutional to the extent it requires the LP to demonstrate any more than a "modicum of support" for advancing to the general election ballot.

35. Initiative 872 lacks a severability clause. Therefore, if any portion of I-872 is unconstitutional, the entire enactment is void.

36. Pursuant to 42 U.S.C. § 1983 *et seq.*, Plaintiffs in Intervention are entitled to a declaratory judgment regarding their civil rights and to their reasonable attorneys' fees and costs in this case.

SECOND CAUSE OF ACTION:
INJUNCTIVE RELIEF

37. Plaintiffs reallege and incorporate by reference Paragraphs 1-36 above.

38. There exists an imminent and ongoing threat by State officials to deprive Plaintiffs in Intervention of their civil rights by requiring Plaintiffs to select the nominees of the LP through a primary process in which Plaintiffs are not permitted to exercise their First

Amendment rights of association and exclusion.

39. Plaintiffs will suffer irreparable injury if the LP's nominee is selected in a primary in which the LP is deprived of its right to define participation in that primary.

40. Plaintiffs are entitled to preliminary and permanent injunctive relief restraining State officials from:

a) conducting any partisan primary without affording the LP reasonable opportunity in advance of that primary to exercise its right to define participation in that primary, by voters and by candidates, and including whether the LP wishes to participate in a primary or alternatively nominate its candidates to the general election ballot by convention or caucus;

b) conducting any partisan primary without implementing a reasonable mechanism to effectuate the LP's exercise of its right to limit participation in that primary to candidates who are current members of the LP;

c) conducting any general election without affording the LP clear and easily ascertainable standards for showing a "modicum" of voter support necessary for access to the general election ballot;

d) encouraging or facilitating, directly or indirectly, cross-over voting or ticket-splitting in connection with any partisan primary except to the extent expressly authorized by the LP for that primary.

41. Plaintiffs are entitled to their reasonable attorneys' fees and costs in connection with this action pursuant to 42 U.S.C. § 1983 *et seq.*

PRAYER FOR RELIEF

Plaintiffs respectfully request the Court enter judgment:

1. Declaring R.C.W. § 29A.24.031 and newly promulgated WAC 434-215-015 unconstitutional.

2. Declaring that R.C.W. §§29A.20.110 through 29A.20.201 remain valid law and ordering the defendants to place on the general election ballot any candidate who complies with their provisions.

3. Declaring that the LP is entitled to nominate its standard bearers for election to public office by convention and/or caucus without substantive interference from the State and/or the Defendant County Auditors.

4. Declaring Initiative 872 unconstitutional to the extent it deprives the LP of the right to determine who may participate in the nomination of its standard bearers.

5. Declaring Initiative 872 unconstitutional to the extent it requires the LP to demonstrate any more than a "modicum of support" for advancing to the general election ballot.

6. Declaring Initiative 872 unconstitutional in its entirety because it lacks a severability clause.

7. Preventing State officials from depriving the LP and its adherents of their civil rights by

requiring the LP to select the nominees of the LP through a primary process in which LP members not permitted to exercise their First Amendment rights of association and exclusion.

8. Grant Plaintiffs preliminary and permanent injunctive relief restraining State officials from:

a) conducting any partisan primary without affording the LP reasonable opportunity in advance of that primary to exercise its right to define its participation in that primary, by voters and by candidates, and including whether the LP wishes to participate in a primary or alternatively nominate its candidates to the general election ballot by convention or caucus;

b) conducting any partisan primary without implementing a reasonable mechanism to effectuate the LP's exercise of its right to limit participation in that primary to candidates who are current members of the LP;

d) conducting any general election without affording the LP clear and easily ascertainable standards for showing a "modicum" of voter support necessary for access to the general election ballot;

e) encouraging or facilitating, directly or indirectly, cross-over voting or ticket-splitting in connection with any partisan primary except to the extent expressly authorized by the LP for that primary.

9. Awarding Plaintiffs reasonable attorneys' fees and costs in connection with this action pursuant to 42 U.S.C. § 1983 *et seq.*

10. Granting such further relief as the Court deems appropriate, including leave to amend these pleadings as discovery proceeds.

DATED Thursday, May 19, 2005, at Tacoma, Washington.

SHEPARD LAW OFFICE, INC.,

Richard Shepard

RICHARD SHEPARD, WSBA # 16194
Attorney for Proposed Intervenors
LIBERTARIAN LP OF WASHINGTON STATE, RUTH BENNETT, and J. S. MILLS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, CHRISTOPHER VANCE, BERTABELLE HUBKA, STEVE NEIGHBORS, BRENT BOGER, MARCY COLLINS, MICHAEL YOUNG, Plaintiffs, v. DEAN LOGAN, King County Records & Elections Division Manager, BOB TERWILLIGER, Snohomish County Auditor; VICKY DALTON, Spokane County Auditor; GREG KIMSEY, Clark County Auditor; CHRISTINA SWANSON, Cowlitz County Auditor; VERN SPATZ, Grays Harbor County Auditor; PAT GARDNER, Pacific County Auditor; DIANE L. TISCHER, Wahkiakum County Auditor; and DONNA M. ELDRIDGE, Jefferson County Auditor, Defendants,	No. CV05-0927-TSZ DECLARATION OF JOHN J. WHITE, JR. IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION NOTE ON MOTION CALENDAR: FRIDAY, JUNE 10, 2005 ORAL ARGUMENT REQUESTED

JOHN J. WHITE, JR. declares under penalty of perjury under the laws of the State of Washington and the United States of America as follows:

1. I am one of the attorneys for the plaintiffs in this lawsuit, am competent to testify, and make this declaration of my own personal knowledge.

2. Attached hereto as Exhibit 1 is a true and correct copy of a printout of the cover page and pages 10, 11, 12, 27, 28, and 29 of the 2004 general election Voters' Pamphlet, published by the Office of the Secretary of State, which I received from Assistant Attorney General Jeff Even by e-mail on May 17, 2005. These pages are devoted to an explanation and text of Initiative 872.

3. Attached hereto as Exhibit 2 is a true and correct reduced copy of a printout of the "Yes on 872" home page, sponsored by The Washington State Grange, http://www.blanketprimary.org.

4. Attached hereto as Exhibit 3 is a true and correct copy of a printout of the "Frequently Asked Questions" link from the "Yes on 872" home page, http://www.blanketprimary.org/faq-jan2004.htm.

5. Attached hereto as Exhibit 4 is a true and correct copy of a printout of the "I-872 Flyer" link from the "Yes on 872" home page.

6. Attached hereto as Exhibit 5 is a true and correct copy of a letter I sent to defendant Dean Logan, King County Records & Elections Division Manager, regarding the Washington State Republican Party's rules governing the nomination of its candidates and the eligibility of candidates to be associated with the Republican Party.

7. Attached hereto as Exhibit 6 is a true and correct copy of a letter I sent to defendant Greg Kimsey, Clark County Auditor, regarding the Washington State Republican Party's rules governing the nomination of its candidates and the eligibility of candidates to be associated with the Republican Party. Identical (in substance) letters were sent to all of the other defendants except Dean Logan, who received the letter attached as Exhibit 5, and Donna M. Eldridge, Jefferson County Auditor.

8. Attached hereto as Exhibit 7 is a true and correct copy of the "Rules for the Nomination of Republican Candidates" that were adopted by the Republican State Committee. A copy of these rules were enclosed with each of the letters identified in Exhibits 5 and 6.

9. Attached hereto as Exhibit 8 are true and correct copies of letters I received from defendants Vicky Dalton (dated May 17, 2005), Greg Kimsey (dated May 16, 2005), Bob Terwilliger (dated May 13, 2005), and Dean Logan (dated April 27, 2005).

10. Attached hereto as Exhibit 9 is a true and correct reduced copy of a printout of an "Elections Calendar" for 2005 web page published by the Secretary of State, http://www.secstate.wa.gov/elections/calendar_list.aspx.

SIGNED this _____ day of May, 2005 in Kirkland, Washington.

John J. White

JOHN J. WHITE, JR.

EXHIBIT 2

Initiative 872 – Preserve the Blanket Primary

YES ON 872

PROTECT OUR RIGHT TO VOTE FOR THE PERSON, NOT THE PARTY

Minor parties benefit from I-872; Grange dispels myths

The Washington State Grange announced today that the effects of the qualifying (or "top-two") primary proposed in Initiative 872 could serve to benefit minor parties in primary elections for legislative races. This is contrary to arguments made recently by opponents of the initiative, who have irresponsibly stated that I-872 will shut out minor parties.

"We've done some research on this issue, and it turns out that the doom and gloom scenarios painted by our opponents are simply not true," said Grange President Terry Hunt. "We looked at legislative elections in 2000 and 2002, and we found that a significant number of third party candidates would have made it to the general election under a qualifying primary."

The Grange's research concluded that, in the primary election of 2000, a total of 13 minor party candidates for the legislature would have advanced to the general election had the top-two system been in place at that time. In three of those races, the minor party candidates actually received a higher proportion of the vote than one or more of the major party candidates in those races. In 2002, four legislative races would have advanced minor party

candidates to the general election under the qualifying primary.

"These figures assume that the dynamics of the qualifying primary will be the same as they were under the blanket primary," said Grange Elections Specialist Don Whiting. "Because a qualifying primary is more competitive than a nominating primary, we could even see more minor party candidates for legislative offices at this 'grass roots' level.

[extraneous web information omitted]

http://www.blanketprimary.org

EXHIBIT 3

BLANKETPRIMARY.ORG

INTIATIVE 872

FREQUENTLY ASKED QUESTIONS

About the Proposed "People's Choice Initiative"

Washington State Grange President Terry Hunt has filed a proposed initiative with the Secretary of State to protect the state's primary system from attacks by the major political parties. These questions and answers relate to the proposed initiative and the legal and legislative context in which it is being proposed.

How would this proposed initiative change our election laws?

This proposed initiative will only make changes in the state's primary laws if the US Supreme Court does not accept an appeal of the Ninth Circuit Court decision against Washington State's blanket primary. We believe that the Supreme Court will eventually uphold the blanket primary, but we need to be prepared if that does not happen. The proposed initiative would replace the current nominating system with a qualifying primary, similar to the nonpartisan primaries used for city, school district, and judicial offices. As in those primaries, the two candidates who receive the greatest number of votes would advance to the general election. Candidates for partisan offices would continue to identify a political party preference when they file for office, and that designation would appear on both the primary and general election ballots.

Would the primary ballot look any different to the voter?

No. At the primary, the candidates for each office will be listed under the title of that office, the party designations will appear after the candidates' names, and the voter will be able to vote for any candidate for that office (just as they now do in the blanket primary).

Would the general election ballot look different to the voter?

Sometimes, but only rarely. Depending on the number of candidates on the primary ballot for a particular office and the amount of public support each candidate achieves, the voter might be presented with a choice in the general election between two candidates of the same political party. This would only happen if both of those candidates received more votes in the primary than any other candidates (in the same party or any other political party). A qualifying primary forces political parties to recruit the best possible candidates and to actively contest all of the offices on the ballot.

Why is the Washington State Grange proposing this initiative?

We know that the voters of Washington overwhelmingly support the blanket primary. In a blanket primary, the voter does not have to declare political party affiliation at any stage of the process, and may vote for any candidate for any office on the primary ballot. "The major political parties are now trying to convince the Legislature and the public that we have to change the primary system to restrict voters choices in the primary and to force independent voters out of the primary altogether," Hunt explained. "This is simply not true. Through

this initiative, we can continue to have all of the benefits of the blanket primary, including the right of a voter to pick any candidate for any office." For seventy years under the blanket primary system, the voters of this state have chosen which candidates advance to the general election ballot. Now, the major political parties are trying to take that away from the voters. This proposed initiative will ensure that the candidates who appear on the general election ballot are those who have the most support from the voters, not just the support of the political party leadership.

Is the blanket primary case "over" and is the blanket primary "dead"?

No. Although the political party leaders have made this claim in the press, the Secretary of State, the Attorney General, and the Washington State Grange will file a motion for review with the U.S. Supreme Court. If the U.S. Supreme Court accepts the request for review, a hearing would be likely in late 2004 or in early 2005. The blanket primary has been upheld by the Washington State Supreme Court twice and by the Federal District Court. The recent decision in the Ninth Circuit is the only time that a federal or state court has ruled that the blanket primary in Washington is invalid.

What will happen if the U.S. Supreme Court hears the case and reverses the ruling of the Ninth Circuit?

If the Supreme Court rules that the blanket primary is valid, we will keep our nominating system exactly as it is now. The Legislature will not need to amend the laws governing the primary in 2004 and the

State Grange will not need to pursue its initiative this year.

What will happen if the U.S. Supreme Court refuses to review the Ninth Circuit Court decision or hears the case and upholds the Ninth Circuit ruling?

Either of these actions would end the legal appeal of this case. If the Supreme Court refuses to hear the case on review or hears the appeal and declares the blanket primary invalid, Washington state will have to adopt a different nominating system for partisan offices. The Legislature would have to adopt a new nominating system for partisan offices – or the voters could do this through the initiative process.

Will there be a ruling from the U.S. Supreme Court before the legislative elections in 2004?

The U.S. Supreme Court will probably either grant or deny a review of the lower court ruling in March or April of 2004. If the Supreme Court takes the case on review and a stay is issued against the Ninth Circuit Court decision, there should be no change in the statutes until after the 2004 election. If the Court denies the review, the Legislature may have to act to provide an alternative system for the 2004 primary. Because of the timing, this might require a special legislative session.

Could the Legislature provide an alternative to the blanket primary during the regular session in 2004, if the U.S. Supreme Court does not decide on the application for review until April or May?

The Legislature should wait until the U.S. Supreme Court has decided whether or not to hear the blanket primary case. However, because that decision may come between the regular session of the Legislature and the beginning of the election process in 2004, the House and Senate will likely hold hearings and other deliberations on possible amendments to the blanket primary in the event that a special session is needed later in 2004.

If all the appeals fail, will we have to require voters to register by party or declare political party at the primary?

No. Although the political parties will probably advocate these options, the Legislature has several other choices to consider. Some of these approaches retain almost all of the features of the current primary system. We can change our current system to a qualifying primary. The only difference would be that, at the general election, the two candidates who received the most votes in the primary (for each office) would appear on the ballot – instead of one candidate from each major political party. Both the U.S. Supreme Court and the Ninth Circuit have ruled that this form of primary is different from the partisan blanket primary now in use in Washington state and that qualifying primaries are not subject to the kind of legal challenge presently being made by the political parties. The State Grange wants the Legislature to know that there are alternatives to the restrictive proposals the political parties are trying to push, and it wants the voters to know that they can continue to have a primary where they choose the candidates that go on the general election ballot.

If Washington adopts a qualifying primary, does this mean that the offices become nonpartisan?

No. Candidates will continue to express a political party preference when they file for office and that party designation will appear on the ballot. An office would only become nonpartisan if the Legislature adopts a statute prohibiting party designations on the ballot for candidates for that office.

In the past, there have been races for major offices including the Governor where the two candidates with the most votes in the primary were from the same political party. Would the initiative encourage this kind of outcome?

No. The initiative should force the political parties to compete more effectively for these offices. Unfortunately, we have seen recent races for Governor where one of the major parties nominated a candidate that received less than 40% of the vote in the general election. Under this initiative, parties should seek candidates with broad public support who can survive a competitive primary.

Does this proposed initiative create a "Cajun" primary, like they have in Louisiana?

Absolutely not. In Louisiana, voters are required to register by political party, and if a candidate receives more than 50% of the vote for an office at the primary, he or she is elected (the office does not even appear on the general ballot). Under this proposed initiative, voters would never have to declare political party affiliation and every office would appear on the general election ballot.

Would this proposal eliminate minor party candidates from the primary or general election ballot?

No. Minor parties would continue to select candidates the same way they do under the blanket primary. Their candidates would appear on the primary ballot for each office (as they do now). Minor party candidates have had good success recently advancing candidates to the general election in districts where only one of the major political parties runs a candidate (about 15% of all legislative districts). Presumably they would continue to do well in these circumstances.

The major political parties have threatened that, if the Legislature adopts a qualifying (top-two) primary, then they would hold their own nominating conventions and sue in court to prevent anyone else from using their "name" as a party label. Would the same thing happen if the initiative is adopted?

A lawsuit is likely, but this is a hollow threat on the part of the parties. They would be unlikely to prevail on either claim. The major political parties can hold conventions and endorse candidates under current election law. The initiative would not change this. However, because there are no statutes preventing other candidates from filing for office and no laws permitting the appearance of the party endorsement on the ballot, such "nominations" are not relevant to the conduct of the primary or the election. The major parties' do not have a defensible claim that no one can use their "name" without their permission. In a recent case in Oregon about this issue, the court held

that the party has no such right. This is the same as Midas Muffler trying to claim that no one else can use the word "muffler". They have a legal right to their whole name, but not to either the word "midas" or the word "muffler", by itself.

PRESERVE YOUR VOTING RIGHTS

[logo]

Sponsored by: Washington State Grange

EXHIBIT 4

YES [picture omitted] I-872

Vote for the person, NOT the party

Initiative Measure 872

Advantages of a Qualifying Primary for Washington State

The federal courts have ruled that Washington can no longer conduct "blanket primaries", as it has for nearly seventy years. During the 2004 session, the Legislature adopted a new type of primary, called a "qualifying primary" or a "top-two primary". However, Governor Locke extensively vetoed that bill, eliminating the qualifying primary and creating instead a nominating primary in which voters will only be able to vote for the candidates of a single party in the primary.

The Washington State Grange opposes primaries in which voters are restricted to voting for candidates of only one party and does not want to see political parties gain control of the primary. Initiative Measure 872 establishes a qualifying primary which will give voters the freedom they enjoyed under the blanket primary — to vote for any candidate they prefer for each office.

Independent Voters Should be Free to Support Any Candidate in the Primary

Most of the voters in Washington are independents who "vote for the person, not the party." They want to support and vote for the candidates that they feel are the most qualified and will do the best job – without regard to the political party of the candidate.

Voters do not want to be restricted in the primary to voting on the candidates of only one party because, for many voters, this prevents them from expressing support for all the candidates they want to see elected. Initiative 872 gives voters this freedom to choose any candidate in the primary.

Qualifying Primaries are More Competitive

Under Initiative 872, the two candidates with the most votes in the primary win and go on to the general election ballot. No political party is guaranteed a spot on the general election ballot. Parties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters.

Under Initiative 872, this will be especially true in "safe" legislative districts that are historically dominated by one party. In a nominating primary system, there may be several candidates from the dominant party in the primary, but only one of them advances to the general. Often, this is the only candidate on the general election ballot. If Initiative 872 is approved, voters in the general election will always have a choice between the two most popular candidates in the primary.

Elected Officials Will be More Representative of the Public

Qualifying primaries are more likely to produce public officials who represent the political preferences and opinions of a broad cross-section of the voters. Candidates will need to appeal to all the voters, partisan and independent alike. They will not be able to win the primary by appealing only to party

activists. A party nominating primary takes control of the primary away from the voters and gives it to the leadership of the political party organizations. The qualifying primary gives voters the kind of control that they exercised for seventy years under the blanket primary.

Initiative 872 Protects Voter Privacy and Increases Participation

Under I-872, voters will never have to declare party or register by party in order to vote in the primary. In the primaries in 2000, the turnout in Washington was more than twice as high as in states with party primaries – because voters in this state could support any candidate on the primary ballot.

The Qualifying Primary is Constitutional

A majority of the US Supreme Court clearly distinguished the two types of primaries. They described the qualifying primary in the following way, "Each voter, regardless of party affiliation, may vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee."

Because the voters are not selecting party nominees, a qualifying primary does not interfere with any constitutionally-protected interest of a political party. The Grange specifically drafted Initiative 872 to conform to this ruling by the US Supreme Court.

A Qualifying Primary Will be Better for Minor Party Candidates

Minor parties will be able to participate more effectively in a qualifying primary system than in nominating primaries. In a qualifying primary, minor parties are more likely to focus their efforts on "grassroots" legislative offices than on statewide and federal positions. If they compete aggressively in districts where one of the two larger parties is not running any candidates, they will have a good chance of qualifying a candidate for the general – and of winning more support for their party than in the past. Initiative 872 creates a level playing field for all candidates in the primary.

YES [picture omitted] **I-872**

EXHIBIT 5

[letterhead omitted]

April 19, 2005

VIA REGULAR MAIL and
FACSIMILE: 206-296-0108

Mr. Dean Logan
King County Records & Elections
King County Administration Building
Room 553
500 Fourth Avenue
Seattle, WA 98104

Re: Nomination of Republican Candidates in 2005

Dear Mr. Logan:

As you know, the Ninth Circuit Court of Appeals struck down Washington's Blanket Primary because it impaired the First Amendment right of association of the Republican Party and its members. The Republican State Committee has adopted rules exercising those rights and governing the process for determining who will be the Republican nominee for partisan elected office. I have enclosed, for your information and use, a copy of those rules.

With the passage of Initiative 872 and its amendment of a portion of Washington's partisan primary law, many details of the administration of the primary remain unresolved or require adoption of appropriate procedures to assure fair representation. If the effect of Initiative 872 is the establishment of a Louisiana-style jungle primary, part III and IV of the rules adopted by the Republican State Committee apply. In that event, the Republican Party will nominate its candidate

through a caucus and convention process. In King County, the caucus and convention process begins May 17 with precinct caucuses. Only the candidate nominated by the Republican Party will be eligible to use the Republican Party name in the September primary. The representation by other candidates that they are affiliated with the Republican Party would cause a substantial risk of confusion among Republican voters, risk fragmentation of the Republican vote and would violate the constitutional rights of association of Republican voters in King County.

If the effect of Initiative 872 is that the primary for partisan King County office will be a Louisiana-style ("top two go forward") primary, we expect the county to respect the Republican Party's selection of its nominee. Please confirm promptly that the county will respect the Republican Party's First Amendment rights and not cause voter confusion by representing that more than one Republican candidate is on a Louisiana-style primary ballot. If you have any questions, please do not hesitate to call.

Very truly yours,

LIVENGOOD, FITZGERALD & ALSKOG, PLLC

John J. White, Jr.

John J. White, Jr.

JJW/lw
Enclosure: a/s
cc: Christopher Vance (w/o encl.)

EXHIBIT 6

[letterhead omitted]

May 6, 2005

VIA REGULAR MAIL and
FACSIMILE: 1-360-397-6007

Mr. Greg Kimsey
Clark County Auditor
P.O. Box 5000
Vancouver, WA 98666-5000

Re: Nomination of Republican Candidates in 2005

Dear Mr. Kimsey:

As you know, the Ninth Circuit Court of Appeals struck down Washington's Blanket Primary because it impaired the First Amendment right of association of the Republican Party and its members. The Republican State Committee has adopted rules exercising those rights and governing the process for determining who will be the Republican nominee for partisan elected office. I have enclosed, for your information and use, a copy of those rules.

With the passage of Initiative 872 and its amendment of a portion of Washington's partisan primary law, many details of the administration of the primary remain unresolved or require adoption of appropriate procedures to assure fair representation. If the effect of Initiative 872 is the establishment of a Louisiana-style jungle primary, part III and IV of the rules adopted by the Republican State Committee apply. In that event, the Republican Party will nominate its candidate through a caucus and convention process. Only the candidate nominated by the Republican Party will be

eligible to use the Republican Party name in the September primary. The representation by other candidates that they are affiliated with the Republican Party would cause a substantial risk of confusion among Republican voters, risk fragmentation of the Republican vote and would violate the constitutional rights of association of Republican voters in Clark County. If Clark County prints ballots identifying persons other than the Republican nominee as a "Republican" candidate, it will be forcing the party and its adherents to affiliate with those unauthorized candidates under the color of state law.

If the effect of Initiative 872 is that the primary for partisan Clark County office will be a Louisiana-style ("top two go forward") primary, we expect the county to respect the Republican Party's selection of its nominee. Please confirm promptly that the county will respect the Republican Party's First Amendment rights and not cause voter confusion by representing that more than one Republican candidate is on a Louisiana-style primary ballot. If you have any questions, please do not hesitate to call.

There is also a question whether I-872 has even come into effect yet, because there has been no final judgment in the prior litigation concerning the blanket primary. If that is the case, the former "Montana" primary would still apply for this cycle.

Very truly yours,

LIVENGOOD, FITZGERALD & ALSKOG, PLLC

John J. White, Jr.

John J. White, Jr.

JJW/lw
Enclosure: a/s
cc: Christopher Vance (w/o encl.)
Brent Boger, Chairman
Clark County Central Committee (w/o encl.)

EXHIBIT 7

Rules for the Nomination of Republican Candidates

PART ONE (Party Primary)

Rule 1. Party Primary Required. Any primary which has the effect of nominating a candidate of the Republican Party shall be conducted by use of a ballot on which only Republican candidates for partisan offices are listed. If the state has established a system of party registration, any voter who is registered as a member of the Republican Party and any voter who has not declared party affiliation may participate in the primary of the Republican Party by affirmatively requesting a Republican Ballot. In the absence of party registration, any voter may participate in the primary of the Republican Party by affirmatively requesting a Republican Ballot. A ballot that contains the names of candidates of other parties will comply with this rule if it provides for a declaration of party identification by the voter and only those declaring themselves to be Republicans shall be tabulated for purposes of determining the Republican nominee for any office.

Rule 2. Identification of Participants in Republican Primary. If permitted by Washington state law or provided for by court order, as a condition of participating in a Republican primary, a voter consents to the state providing the Republican Party with a list including the voter's name as a voter who participated in the Republican Party primary.

PART TWO: Qualification for Primary Ballot

Rule 3. Party Registration Required. If the state of Washington shall have established a system of voter registration in which voters may register as a member of the Republican Party, any candidate seeking to qualify for the primary ballot as a Republican must be registered as a Republican at the time the declaration of candidacy is filed.

Rule 4. Significant Support Required. The Republican Party asserts the right to grant permission to use the Republican name and to file seeking the Republican nomination for partisan offices only to candidates who demonstrate significant support within the Republican Party. Rules in Part Two shall become effective January 1, 2005 for all partisan elections conducted after that date.

Rule 5. Significant Support for Incumbents. When an incumbent seeking reelection obtains a vote of more than 66% at a nominating convention called pursuant to rules 6 through 10 as applicable for his office, the incumbent shall be the only candidate certified. If the incumbent does not receive a vote of more than 66%, the incumbent and any challenger must qualify under Rules 6 through 10.

Rule 6. Demonstration of Significant Support: Statewide Office. A candidate for partisan statewide office (including United States Senator) demonstrates significant Republican support by obtaining a vote of 25% or more of the delegates to a Republican nominating convention held not earlier than the first day of May and not

later than the Sunday before filing for office commences and held pursuant to the rules for caucuses and conventions adopted by the Republican State committee of Washington, and further complying with these rules.

Rule 7: Demonstration of Significant Support, United States Congress.

A candidate for United State Congress demonstrates significant Republican support by obtaining the vote of 25% or more of the delegates to county conventions from precincts within the Congressional District. Votes shall be tallied at each county convention (or, if provided for by the rules of the county, at legislative district caucuses called by the respective county), such nominating conventions or caucuses held not earlier than the first day of April and not later than the last date set for the holding of county conventions in accordance with the rules for caucuses and conventions adopted by the Republican State Committee of Washington. The results from each county shall be reported to the Secretary, the Republican State Committee of Washington, within three days after the convention has adjourned.

Rule 8. Demonstration of Significant Support: County Office. A candidate for any county partisan office demonstrates significant Republican support by obtaining the vote of 25% or more of the delegates to a Republican county nominating convention, such nominating convention to be held not earlier than the first day of April and not later than the last date set for the holding of county conventions in accordance with the rules for

MSNBC.com

State GOP picks Hammond – Dunn will still run in primary for 9th District

by Dean A. Radford, Journal Reporter
The King County Journal

BELLEVUE – Steve Hammond of Enumclaw pulled off a minor upset Saturday, beating political newcomer Reagan Dunn for the Republican Party nomination in the County Council's 9th District.

The political power of the Dunn family name—he's the son of former U.S. Rep. Jennifer Dunn—and more than $100,000 in contributions filled Dunn's campaign sails.

But Hammond succeeded where it counted the most—he got his people to the polling place, the county party's nominating convention. It's the fourth time in just two years that his political future has been in the hands of others.

The 9th District was the council race everyone came to watch or to cast a ballot in, drawing about 60 percent of the convention's 721 delegates.

But don't count out Dunn yet, even though the convention was intended to pick the party's one nominee for county executive and each County Council district race.

Because of the closeness of the outcome, just 26 votes, Dunn, of Bellevue, plans to file as a candidate in the September election, which is designed to send the top two vote-getters to the general election.

"I think it's time to let the people decide," he said, saying he's not disrespectful of the party, which has now endorsed Hammond.

The question is whether his name will have an R for Republican after it. A decision on a federal lawsuit over the state's primary system could play a part in the answer. The chairman of the county Republican Party, Michael Young, said the state party would sue King County to remove Dunn's name from the ballot if he runs as a Republican.

It would put the party in the uncomfortable position of challenging the son of a former chairwoman of the state party, Jennifer Dunn.

If necessary, "I am going alone," said the lifelong Republican.

Dunn thinks the loser in a council race in Seattle pitting two Democratic incumbents, Bob Ferguson and Carolyn Edmonds, will make the same choice.

It's possible Dunn and Hammond could both advance to the general election, depending on the strength of the candidate the Democrats field in the race. Their nominating convention is later this month in Bellevue.

The final vote tally was 234 for Hammond to 209 for Dunn. In keeping with recent problems counting ballots in King County, there were eight more ballots cast than eligible voters.

But the difference wasn't enough to change the outcome of the election, so the results stood.

Had he lost, Hammond said he would have bowed to the wishes of the party and not challenged Dunn in

the September election. He's not sure how to react to Dunn's decision, now.

But, he said, the challenges "just keep coming," especially from within his own party. Some have said Dunn was the object of "dirty politics" late in the race, but that allegation caught Hammond by surprise.

Dunn's hand shake and a hug after the vote, Hammond said, was a sign of party unity.

Hammond kept his cards—his delegates—close to his chest. Cautious optimism has become part of his election-day lexicon. Just before the convention, Dunn said the race for delegates had tightened considerably, but he felt he was pulling away.

Each candidate's name was placed into nomination; then they gave a five-minute speech. Speaking next to the podium with microphone in hand, Dunn said he is the stronger of the two candidates to beat a Democrat.

He pointed out that gubernatorial candidate Dino Rossi barely carried the 9th District. After his speech, Dunn sat in the back row to listen to Hammond. His mother walked over and placed her hand on his shoulder.

Both candidates whipped up the delegates with harsh criticisms of County Executive Ron Sims, especially the way his elections division handled the 2004 election, and of the much-maligned, at least in rural areas, Critical Areas Ordinance.

"We are in the middle of a war," Hammond said. "I am asking that you not take me off the battlefield."

Saturday, it was Hammond's soldiers who won the battle. He seemed to enjoy the day, chatting easily with supporters.

A union member, Barbara Bogar of Enumclaw, admits she's a Democrat, but "today, I am a Republican for him." Hammond's experience on the council matters to her.

"He's not new coming into it," she said. "He's here for us."

Both candidates started their political careers as appointees, replacing council icons, now attorney general Rob McKenna in Dunn's case and the late Kent Pullen in Hammond's case.

Each bore the title incumbent, just from different districts. Redistricting threw them together in the council's new 9th District, which Hammond has represented.

Rossi nominates Irons for county executive post

By Dean A. Radford

Journal Reporter

BELLEVUE—Republican officials admit Saturday's first-ever nominating convention was a bit chaotic, but Dino Rossi brightened everyone's day when he nominated David Irons for county executive.

EXHIBIT E

POLITICAL ADVERTISING

[picture]

Public Disclosure Commission

[LOGO]

711 CAPITOL WAY RM 206
PO BOX 40908
OLYMPIA WA 98504-0908
(360) 753-1111
TOLL FREE 1-877-601-2828

December 2004

"Political Advertising" includes any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support in any election campaign.

GENERAL REQUIREMENTS

Sponsor ID: Written ads must identify the sponsor's name and address unless exempt.*

Exempt From Sponsor ID: Yard signs (8' x 4' or smaller) and some other items are exempt. See list at far right.

Broadcast Ads: Radio and TV ads must state the sponsor's full name, but not the address.*

Party Affiliation: All forms of advertising must clearly state a candidate's party affiliation if the candidate is seeking partisan office. *This requirement applies regardless of whether the ad is sponsored by the candidate or someone else.*

Size and Placement: See back side of brochure for size and placement criteria regarding sponsor and party ID.

Photographs: If candidate photos are used in any ad, at least one of them must have been taken within the last 5 years and be no smaller than the largest candidate photo in the ad.

Office Sought: State law does not require ads to include the office or position a candidate is seeking.

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*Advertising that qualifies as an "independent expenditure" is subject to different sponsor ID requirements (unless the sponsor is a political party). See reverse side.

The Law Forbids:

- Using an assumed name when identifying the sponsor.
- Sponsoring an ad that contains a false statement of material fact *about a candidate* (unless a candidate is making statements about him or herself).
- Falsely claiming or implying a person or group supports or endorses a candidate when they do not.
- Falsely representing a candidate as the incumbent. (On letterhead, yard signs and other forms of advertising, non-incumbents must actually state they're seeking the office: e.g., Mary Smith for State Senate or Elect Mary Smith State Senator.)
- Distributing campaign material deceptively similar in design or appearance to the voters and candidate's pamphlets published by the Secretary of State.
- Using the state seal or its likeness to assist or defeat a candidate.

These definitions apply in political ads:

"Incumbent" means a person who now holds an elected office.

"Re-elect" represents that the candidate is presently holding the office being sought, was elected to it, and is seeking another term in that same office in the same district or political subdivision.

"Retain" represents that the candidate is the incumbent but does not imply that the candidate attained the office by election.

"Return" represents that the candidate now holds, or has previously held, the office being sought, but does not represent that the office was attained by election.

"Sponsor" means the candidate, committee or other person who pays for the advertisement. If a person acts as an agent for another or is reimbursed for payment, the original source of the payment is the sponsor.

To identify the sponsor, use the words "Paid for by" or "Sponsored by" followed by the name and address of the sponsor.*

What's Needed for Sponsor ID

State, Local & Judicial Candidates—show the candidate's name and address or the candidate's committee name and address.

Federal Candidates—only subject to federal law. (Contact FEC at 1-800-424-9530)

Political committees—show the committee's name and address. The treasurer's name is not required.*

Organizations or businesses—show the organization or business name and address. President or treasurer's name is not required.*

Multiple sponsors—show each sponsor's name and address. If one person pays for printing and another pays for mailing, list both sponsors.*

Printed ads—show the sponsor's name, mailing address and, if applicable, the candidate's party affiliation in an area apart from the ad text. If the ad is more than one page, identify the sponsor (and party) on *the first page*. Identification on a mailing envelope is optional; it's the ad enclosed in the envelope that must be properly identified.*

Radio and TV ads—clearly say the sponsor's name. Address not required.*

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*Advertising that qualifies as an "independent expenditure" is subject to different sponsor ID requirements (unless the sponsor is a political party). See reverse side.

Items Exempt from Sponsor ID

ashtrays
badges & badge holders
balloons
bingo chips
brushes
bumper stickers (4" x 15" or smaller)
business cards
buttons
newspaper ads (one column inch or smaller)
noisemakers
official state or local voter pamphlets
paper & plastic cups
paper & plastic plates
paperweights
pencils

cigarette lighters
clothes pins
clothing
coasters
combs
cups
earrings
emery boards
envelopes
erasers
Frisbees
glasses
golf balls & tees
hand-held signs
hats
horns
ice scrapers
inscriptions
key rings
knives
labels
letter openers
magnifying glasses
matchbooks
nail clippers & files
pendants
pens
pinwheels
plastic tableware
pocket protectors
pot holders
reader boards with moveable letters
ribbons
rulers (12" or smaller)
shoe horns
skywriting
staple removers
sticker (2-3/4" x 1" or smaller)
sun glasses
sun visors
swizzle sticks
tickets to fund raisers
water towers
whistles
yard signs (8' x 4' or smaller)
yo-yo's
all similar items

ID Size and Placement

According to state law, on written or printed political advertising, the sponsor's full name and address and the candidate's party affiliation must:

- appear on the first page of the communication in at least 10 point type, or
- for ads such as billboards or posters, appear in type at least 10% of the largest size type used in the ad, and
- not be screened or half-toned (i.e., not made lighter through some printing or photographic process, and
- be set apart from any other ad text.

In any radio or TV political ad, the sponsor's full name and candidate's party identification must be clearly spoken.

Abbreviations

The following abbreviations may be used in advertising. PDC believes they clearly identify political party affiliation.

Communist—Com

Democrat—D, Dem, Demo

Independent or unaffiliated—Ind, Indep

Libertarian—L, LP, LET, LBTN

Republican—R, GOP, Rep (Use the latter only when it could not erroneously imply the candidate is a State Representative.)

Socialist—Soc

Socialist Workers—Soc Workers, SWP

Official symbols or logos adopted by the state committee of the party may be used in lieu of other identification; a copy of the symbol or logo should be provided to the PDC.

Independent Expenditure Advertising

Political advertising that meets **all** of the following criteria must include more details about the sponsor(s):

1) the ad supports or opposes a candidate for state or local office;

2) the ad is paid for by someone other than a candidate, a candidate's committee or agent;

3) the sponsor does the advertising completely independently of any candidate supported in the ad (or the opponent of the candidate opposed), or a candidate's committee or agent;

4) the sponsor did not received the candidate's encouragement or approval to do the ad; and

5) the ad costs at least $675, or the cost of this ad when combined with the cost of earlier ads supporting or opposing the candidate total $675 or more.

If all 5 conditions are met and the sponsor is other than a political party, the ad must contain the following:

"NOTICE TO VOTERS (Required by law): This advertisement is not authorized or approved by any

candidate. It is paid for by (name, address, city, state.)"

Further, if this type of *ad is sponsored by a political committee or PAC*, the following must also appear: "Top Five Contributors" followed by a list of the names of the five persons or entities making the largest contributions to the PAC during the 12 months before the ad runs. If a political committee keeps records necessary to track contributions according to the use intended by contributes, that committee may identify the top five contributors giving for that purpose.

Both the "Notice to Voters" and "Top Five Contributors" messages *must comply with the ID Size and Placement standards noted above.*

The "Notice to Voters" and "Top Five Contributors" provisions for radio and television independent expenditure political advertising must be clearly spoken.

If independent expenditure advertising is in the form of yard signs, bumper stickers, skywriting or other items exempt from sponsor ID (as discussed on the reverse), these ads are also exempt from the Notice to Voters and Top Five Contributors requirements.

MAILINGS: Any person or entity, except a political party or political committee, that in one calendar year mails 1,000 identical or nearly identical pieces of advertising supporting or opposing a candidate or ballot measure as an independent expenditure must provide the appropriate county auditor with a copy of the ad and written notice of the number of pieces

mailed within two working days of the mailing. Contact PDC for more information.

REPORTING INDEPENDENT EXPENDITURES: Anyone (except a committee already filing with PDC) that spends $100 or more supporting or opposing a candidate or ballot measure—and the expenditures are not made in conjunction with a candidate or ballot issue committee—must file independent expenditure reports (Form C-6). Last minute independent expenditure political ads valued at $1,000 or more presented to the public within 21 days of an election must be reported within 24 hours.

In addition, any business, union, association or other entity that during one calendar year makes independent expenditures totaling over $675 supporting or opposing state office candidates and statewide ballot measure must also file Form C-7 (unless the entity reports the expenditures as a PAC or lobbyist employer).

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEOMCRATIC CENTRAL COMMITTEE, et al., Plaintiff Intervenors LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Intervenors v. DEAN LOGAN, King County Records & Elections Division Manager, et al., Defendants, STATE OF WASHINGTON, et al., Defendant Intervenors WASHINGTON STATE GRANGE, Defendant Intervenors.	NO. CV05-0927Z WASHINGTON STATE GRANGE'S ANSWER TO INTERVENOR PLAINTIFF DEMOCRATS' COMPLAINT

I. ANSWER

In answer to the Complaint In Intervention For Declaratory Judgment And For Injunctive Relief Regarding Initiative 872 And Primary Elections

("Complaint") alleged by the intervenor plaintiff Democrats in this case, the defendant-intervenor Washington State Grange answers and alleges as follows:

1. The allegations in paragraph 1 of the Complaint assert self-serving legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied. Moreover, those assertions are not even an accurate summary or characterization of the law.

2. The allegations in paragraph 2 of the Complaint assert self-serving legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied. Moreover, the assertions relating to "the selection of a political party's candidates and nominees" are irrelevant to this suit, because the primary system established by the voters' overwhelming enactment of Initiative 872 does not select the candidate or nominee for any *political party*. Instead, it determines the two candidates or nominees for the *general election ballot*.

3. This defendant-intervenor admits that our State's voters overwhelmingly enacted Initiative 872, which became effective on or about December 2, 2004. The remaining allegations in paragraph 3 of the Complaint assert self-serving legal arguments and legal conclusions concerning that enactment, rather than allegations of fact, and therefore need not be admitted or denied. Moreover, those assertions are not even an accurate summary or characterization of the law.

4. For the reasons set forth in this Answer, this defendant-intervenor denies the assertions and allegations in paragraph 4 of the Complaint.

5. This defendant-intervenor denies the assertions in paragraph 5 that "Initiative 872 is unconstitutional" and that "this is an action to protect the First Amendment rights of the Party and its adherents to advocate and promote their vision for the future without subtle or overt censorship or interference by the State through the County Auditors". Instead, this is an action by the Political Parties to quash the First Amendment and political speech rights of persons running for public office, to nullify the right of Washington voters to enact their laws by Initiative, and to entice judicial activism by demanding that this federal court impose the type of primary system that the Political Parties could not succeed in getting our State Legislature or our State's voters to enact.

6. This defendant-intervenor admits that this case involves a federal question and that jurisdiction is proper in this Court. The remaining allegations in paragraph 6 of the Complaint assert self-serving legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied.

7. This defendant-intervenor admits that venue lies within this Western District of Washington at Seattle.

8. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the Complaint, and

therefore denies them. Moreover, what is intended by several allegations in this paragraph (e.g., those relating to "powers inherent" and "functions inherent" in a political party) are too vague to meaningfully admit or deny.

9. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 of the Complaint, and therefore denies them.

10. This defendant-intervenor admits the defendant County Auditors named in paragraph 10 of the Complaint have the responsibilities provided by Washington law. On information and believe, this defendant-intervenor also admits the residence location of those Auditors as alleged in paragraph 10. In further Answer to the Complaint's identification of the defendants in paragraph 10, this defendant-intervenor notes that the Court has granted the State of Washington, the Washington Secretary of State Sam Reed, the Washington Attorney General Rob McKenna, and the Washington State Grange permission to intervene in this action as defendant-intervenors. The defendant-intervenor Washington State Grange was the proponent of Initiative 872.

11. This defendant-intervenor admits that the primary established by Initiative 872 will be conducted in September 2005, but at this time is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of the Complaint concerning the County Auditor quotation stated in the last sentence of that paragraph. The remaining

allegations in paragraph 11 assert self-serving legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied. Those assertions, moreover, are not even an accurate summary or characterization of the law – for they set forth quotations out of context and without acknowledgment of provisions superceded by Initiative 872. More specifically, the election system established by the voters' adoption of Initiative 872 defines "partisan office" as "a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name", and establishes that "any party or independent preferences are shown for the information of voters only". [Initiative §4 & §7(3).] Contrary to the legal arguments asserted in this paragraph of the Complaint, the primary system established by the voters' adoption of Initiative 872 does *not* select the candidate or nominee for any political party, but rather determines the two candidates or nominees for the general election ballot, while allowing each candidate to disclose to the voters his or her own political party preference.

12. For the reasons set forth in this Answer, this defendant-intervenor denies the assertions and allegations in paragraph 12 of the Complaint.

13. For the reasons set forth in this Answer, this defendant-intervenor denies the assertions and allegations in paragraph 13 of the Complaint.

14. This defendant-intervenor admits that Initiative 872 and the voters pamphlet referred to in

paragraph 14 speak for themselves. The remaining allegations in paragraph 14 assert self-serving legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied. Those assertions, moreover, are not even an accurate summary or characterization of the law. Contrary to the legal arguments asserted in this paragraph of the Complaint, the primary system established by the voters' adoption of Initiative 872 does *not* select the candidate, nominee, or "standard-bearer" for any *political party*. Instead, it determines the two candidates or nominees for the *general election ballot*.

15. The legal argument asserted in paragraph 15 of the Complaint is too vague to determine if it contains a factual allegation to be admitted or denied, and this defendant-intervenor accordingly denies it.

16. The allegations in paragraph 16 of the Complaint primarily assert self-serving legal arguments and legal conclusions rather than allegations of fact. Moreover, this paragraph's arguments relating to "the adulteration of the Party's nomination process" are irrelevant to this suit, because the primary system established by the voters' overwhelming enactment of Initiative 872 does not select the candidate or nominee for any *political party*. Instead, it determines the two candidates or nominees for the *general election ballot*. Moreover, the arguments in this paragraph relating to "candidates' messages" and the political parties' complaints about the prospect of the voters (rather than the Political Parties) selecting the two candidates for the general election ballot confirm this

defendant-intervenor's prior observation that this is really an action by the Political Parties to quash the First Amendment and political speech rights of persons running for public office, and to secure from this federal court the type of primary system that the Political Parties could not succeed in getting our State Legislature or our State's voters to enact.

17. The allegation in paragraph 17 of the Complaint asserts a self-serving legal argument and legal conclusion rather than an allegation of fact, and therefore need not be admitted or denied. Moreover, that assertion is not even an accurate summary or characterization of the law since it ignores the superceding effect of the enactment of Initiative 872.

18. The allegations in paragraph 18 of the Complaint assert self-serving legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied. Moreover, those assertions are not even an accurate summary or characterization of the law since they ignore the superceding effect of the enactment of Initiative 872. The election system established under Initiative 872 does not deny the plaintiff equal protection of the law as suggested by the section heading above this paragraph of the Complaint.

19. The *Reed* decision selectively quoted and characterized in paragraph 19 of the Complaint speaks for itself, and therefore that paragraph's self-serving partial characterization of that Court decision is denied.

20. The *Jones* and *Reed* decisions selectively quoted and characterized in paragraph 20 of the Complaint speak for themselves, and therefore

that paragraph's self-serving partial characterization of those Court decisions is denied.

21. This defendant-intervenor denies the allegations in the first sentence of paragraph 21, and in response to the second sentence admits that the Initiative and voters pamphlet speak for themselves.

22. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22 of the Complaint, and therefore denies them. [This defendant-intervenor notes that the "Defendants" at the time that paragraph 22 was written did not yet include this defendant-intervenor, and thus that paragraph's statement about providing copies of the "rules" references in this paragraph does not apply. This defendant-intervenor would welcome the intervenor plaintiffs' providing it a copy of those "rules".] In any event, this paragraph's allegation concerning "candidates [of] the Party" is irrelevant to this suit, because the primary system established by the voters' overwhelming enactment of Initiative 872 does not select the candidate of any *political party*. Instead, it determines the two candidates or nominees for the *general election ballot*.

23. The allegations in paragraph 23 of the Complaint concerning plaintiffs' "rights" assert self-serving legal arguments and legal conclusions rather than allegation of fact, and therefore need not be admitted or denied. For the reasons set forth in this Answer, this defendant-intervenor denies the remaining allegations in paragraph 23 of the Complaint.

24. The allegations in paragraph 24 of the Complaint concerning plaintiffs' "rights" assert self-serving legal arguments and legal conclusions rather than allegation of fact, and therefore need not be admitted or denied. For the reasons set forth in this Answer, this defendant-intervenor denies the remaining allegations in paragraph 24 of the Complaint.

25. This defendant-intervenor realleges and incorporates by reference its above answers to the paragraphs that the Complaint realleges and incorporates in paragraph 25.

26. This defendant-intervenor admits a controversy exists concerning the Complaint's claim that our State's primary system under Initiative 872 is unconstitutional, but for the reasons previously noted in this Answer, denies the remaining allegations and assertions in paragraph 26 of the Complaint.

27. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 27 of the Complaint.

28. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 28 of the Complaint.

29. This defendant-intervenor admits that Initiative 872 does not have an express severability clause, but denies the assertion in paragraph 29 of the Complaint that the *entire* Initiative is therefore void if *any portion* of it is unconstitutional.

30. For the reasons previously noted in this Answer, this defendant-intervenor denies the

allegations in paragraph 30 of the Complaint. Moreover, the attorney fee provision alleged does not apply to recovery against this defendant-intervenor.

31. This defendant-intervenor realleges and incorporates by reference its above answers to the paragraphs that the Complaint realleges and incorporates in paragraph 31.

32. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 32 of the Complaint.

33. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 33 of the Complaint.

34. This defendant-intervenor realleges and incorporates by reference its above answers to the paragraphs that the Complaint realleges and incorporates in paragraph 34.

35. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 35 of the Complaint.

36. This defendant-intervenor denies the allegations in paragraph 36 of the Complaint. Moreover, the attorney fee provision alleged does not apply to recovery against this defendant-intervenor.

37. This defendant-intervenor realleges and incorporates by reference its above answers to the paragraphs that the Complaint realleges and incorporates in paragraph 37.

38. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 38 of the Complaint.

39. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 39 of the Complaint.

40. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 40 of the Complaint.

41. This defendant-intervenor denies the allegations in paragraph 41 of the Complaint. Moreover, the attorney fee provision alleged does not apply to recovery against this defendant-intervenor.

42. The Complaint's Prayers For Relief require no reply under the Civil Rules, and are therefore denied.

43. All allegations in the Complaint not specifically admitted above are denied.

II. DEFENSES

By way of further answer to the Complaint, and as further defenses, this defendant-intervenor alleges:

44. The Complaint fails to state a claim upon which relief can be granted.

45. To the extent the Complaint alleges "as applied" rather than "facial" invalidity of the upcoming September 2005 primary, this action is prematurely brought.

46. To the extent that the Complaint alleges any sort of trademark or tradename type protection of the party "label", the Complaint's allegations are barred by, e.g., the doctrines of laches, waiver, and estoppel.

47. To the extent that the Complaint alleges any sort of equitable protection of the party "label" or entitlement to a Court Order imposing the previously existing "Montana" primary system upon the State of Washington, the Complaint's allegations are barred by, e.g., the doctrines of unclean hands.

48. All allegations in the Complaint not specifically admitted above are denied.

III. PRAYER FOR RELIEF

Having fully Answered the Complaint, this defendant-intervenor respectfully requests the following relief from this Court:

1. Entry of a judgment dismissing the Complaint with prejudice, and denying the Complaint's requested injunctive, declaratory, and other relief;

2. Entry of a judgment declaring that Washington's election law as established by Initiative 872 does not deprive the plaintiffs of any legally cognizable rights protected by the constitution or laws of the United States or the State of Washington;

3. Entry of a judgment awarding defendant-intervenor recovery of its costs and attorney fees to the full extent allowed by law;

4. Permission to amend the pleadings to add additional matters verified during discovery or to conform to the evidence offered at the time of hearing or trial; and

5. Such other relief as the Court deems proper, just, or equitable.

RESPECTFULLY SUBMITTED this 10th day of June, 2005.

FOSTER PEPPER &
SHEFELMAN PLLC

Thomas F. Ahearne

Thomas F. Ahearne, WSBA No. 14844
Attorneys for Defendant-Intervenor
WASHINGTON STATE GRANGE.

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEOMCRATIC CENTRAL COMMITTEE, et al., Plaintiff Intervenors LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Intervenors v. DEAN LOGAN, King County Records & Elections Division Manager, et al., Defendants, STATE OF WASHINGTON, et al., Defendant Intervenors WASHINGTON STATE GRANGE, Defendant Intervenors.	NO. CV05-0927Z WASHINGTON STATE GRANGE'S ANSWER TO INTERVENOR PLAINTIFF LIBERTARIANS COMPLAINT

I. ANSWER

In answer to the Libertarian Party's Complaint To Intervene For Declaratory Judgment And Other Relief ("Complaint") alleged by the intervenor plaintiff Libertarians in this case, the defendant-intervenor Washington State Grange answers and alleges as follows:

[Note: The Libertarians' pleading includes several un-numbered paragraphs under the heading "Summary Of Action", which appear *before* the heading captioned "COMPLAINT". Those un-numbered paragraphs appear to be merely a summary of what the ensuing numbered paragraphs of the Complaint claim rather than separate allegations of fact to be admitted or denied under the Civil Rules. To the extend those un-numbered paragraphs before the "COMPLAINT" allegations were intended to be separate allegations to be admitted or denied, this defendant-intervenor denies them for the reasons stated in the ensuing numbered paragraphs answering the numbered paragraphs of the Complaint.]

1. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the Complaint, and therefore denies them.

2. This defendant-intervenor admits that Ms. Bennett was a candidate for governor in the 2004 election, but at this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 2 of the Complaint, and therefore denies them.

3. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3 of the Complaint, and therefore denies them.

4. This defendant-intervenor admits the defendant County Auditors named in paragraph 4 of the Complaint have the responsibilities provided by Washington law. On information and believe, this defendant-intervenor also admits the residence location of those Auditors as alleged in paragraph 4. In further Answer to the Complaint's identification of the defendants in paragraph 4, this defendant-intervenor notes that the Court has granted the State of Washington, the Washington Secretary of State Sam Reed, the Washington Attorney General Rob McKenna, and the Washington State Grange permission to intervene in this action as defendant-intervenors. The defendant-intervenor Washington State Grange was the proponent of Initiative 872.

5. This defendant-intervenor admits the allegation in paragraph 5 that this case involves a federal question and that jurisdiction is proper in this Court.

6. This defendant-intervenor admits that the allegation in paragraph 6 that venue lies within this Western District of Washington at Seattle.

7. The allegations in paragraph 7 of the Complaint assert self-serving legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied. Moreover, those assertions are not even an accurat summary or characterization of the law. This defendant-intervenor further notes in answer to paragraph 7 that that paragraph's assertion relating to "the right of a party to select its nominees" is irrelevant to this suit, because the primary system established by the voters' overwhelming enactment of Initiative 872

does not select the candidate or nominee for any *political party*. Instead, it determines the two candidates or nominees for the *general election ballot*.

8. For the reasons set forth in this Answer, this defendant-intervenor denies the assertions and allegations in paragraph 8 of the Complaint.

9. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 concerning other parties' assertions and/or interpretations. This defendant-intervenor admits that Initiative 872 speaks for itself.

10. This defendant-intervenor admits that Initiative 872 and the voters pamphlet speak for themselves. For the reasons set forth in this Answer, this defendant-intervenor denies the remaining assertions and allegations in paragraph 10 of the Complaint.

11. This defendant-intervenor admits that Initiative 872 and the voters pamphlet speak for themselves. For the reasons set forth in this Answer, this defendant-intervenor denies the remaining assertions and allegations in paragraph 11 of the Complaint.

12. The allegations in paragraph 12 of the Complaint assert legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied. Moreover, those assertions are not even an accurate summary or characterization of the law.

13. The legal argument asserted in paragraph 13 of the Complaint is too vague to determine if it contains a factual allegation to be admitted or denied, and this defendant-intervenor accordingly denies it.

14. For the reasons set forth in this Answer, this defendant-intervenor denies the assertions and allegations in paragraph 14 of the Complaint. Moreover, contrary to the legal arguments asserted in this paragraph of the Complaint, the primary system established by the voters' adoption of Initiative 872 does *not* select "standard-bearer" for any *political party*. Instead, it determines the two candidates or nominees for the *general election ballot*.

15. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 15. This defendant-intervenor admits that the WAC provision cited in the second sentence of paragraph 15 speaks for itself, and accordingly denies that sentence's partial characterization of that provision and its legal effect.

16. This defendant-intervenor admits that §17 of the Initiative is what paragraph 16 apparently refers to as a "repealer section", but denies that the statutes superceded by the primary system established by the enactment of Initiative 872 "remain valid law". At this moment, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraph 16 regarding

what the State has or has not previously "recognized", but admits that to the extent such "recognition" is stated in the court pleadings referred to in this paragraph, those pleadings should speak for themselves.

17. This defendant-intervenor admits that the primary system established by the enactment of Initiative 872 superceded inconsistent provisions of state law, but denies that the law provides plaintiffs the "rights" and protections alleged in paragraph 17 of the Complaint.

18. The argument asserted in paragraph 18 of the Complaint is speculation rather than an allegation of fact as required under the Civil Rules, and is accordingly denied.

19. For the reasons set forth in this Answer, this defendant-intervenor denies the assertions and allegations in paragraph 19 of the Complaint.

20. For the reasons set forth in this Answer, this defendant-intervenor denies the assertions and allegations in the first sentence of paragraph 20 of the Complaint. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the "national trademark" assertion in the second sentence of paragraph 20 or whether plaintiff has taken all steps required to preserve the "trademark" rights alluded to in that sentence, and therefore denies that same.

21. The allegations in paragraph 21 of the Complaint assert speculation, legal arguments, and legal conclusions rather than allegations of fact, and

therefore need not be admitted or denied. Moreover, the *Storer* decision characterized in this paragraph speaks for itself, and thus this paragraph's partial characterization of it is denied.

22. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22, and therefore denies the same.

23. For the reasons set forth in this Answer, this defendant-intervenor denies the assertions and allegations in paragraph 23 of the Complaint.

24. For the reasons set forth in this Answer, this defendant-intervenor denies the assertions and allegations in paragraph 24 of the Complaint. Moreover, this paragraph's arguments relating to "the adulteration of the LP's nomination process" are irrelevant to this suit, because the primary system established by the voters' overwhelming enactment of Initiative 872 does not select the candidate or nominee for any *political party*. Instead, it determines the two candidates or nominees for the *general election ballot*.

25. The argument asserted in paragraph 25 of the Complaint alleges a hypothetical rather than allegation of fact to be admitted or denied under the Civil Rules.

26. The allegations in paragraph 26 of the Complaint assert legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied. Moreover, the *Williams* decision selectively quoted in this

paragraph speaks for itself, and the legal conclusion proposed by this paragraph is not an accurate characterization of the law as it relates to this case.

27. The allegations in paragraph 27 of the Complaint assert legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied. Moreover, the cases and statute selectively quoted and characterized in this paragraph speak for themselves, and the legal conclusions proposed by this paragraph are not an accurate characterization of the law as it relates to this case. This defendant-intervenor denies that Initiative 872 is arbitrary and denies due process rights for LP candidates.

28. This defendant-intervenor realleges and incorporates by reference its above answers to the paragraphs that the Complaint realleges and incorporates in paragraph 28.

29. This defendant-intervenor admits a controversy exists concerning the Complaint's claim that our State's primary system under Initiative 872 is unconstitutional, but for the reasons noted in this Answer, denies the remaining allegations and assertions in paragraph 29 of the Complaint.

30. For the reasons set forth in this Answer, this defendant-intervenor denies the assertions and allegations in paragraph 30 of the Complaint.

31. This defendant-intervenor denies the argument in paragraph 31 of the Complaint that statutes which were superceded by the primary system established by the enactment of

Initiative 872 "remain valid law" and therefore cannot be "overridden" by the Secretary's rules.

32. The allegation in paragraph 32 of the Complaint asserts a legal conclusion rather than an allegation of fact, and is therefore denied.

33. The allegation in paragraph 33 of the Complaint asserts a legal conclusion rather than an allegation of fact, and is therefore denied.

34. The allegation in paragraph 34 of the Complaint asserts a legal conclusion rather than an allegation of fact, and is therefore denied.

35. This defendant-intervenor admits that Initiative 872 does not have an express severability clause, but denies the assertion in paragraph 35 of the Complaint that the *entire* Initiative is therefore void if *any portion* of it is unconstitutional.

36. For the reasons noted in this Answer, this defendant-intervenor denies the allegations in paragraph 36 of the Complaint. Moreover, the attorney fee provision alleged does not apply to recovery against this defendant-intervenor.

37. This defendant-intervenor realleges and incorporates by reference its above answers to the paragraphs that the Complaint realleges and incorporates in paragraph 37.

38. For the reasons noted in this Answer, this defendant-intervenor denies the allegations in paragraph 38 of the Complaint.

39. For the reasons noted in this Answer, this defendant-intervenor denies the allegations in paragraph 39 of the Complaint.

40. For the reasons noted in this Answer, this defendant-intervenor denies the allegations in paragraph 40 of the Complaint.

41. For the reasons noted in this Answer, this defendant-intervenor denies the allegations in paragraph 41 of the Complaint. Moreover, the attorney fee provision alleged does not apply to recovery against this defendant-intervenor.

42. The Complaint's Prayer For Relief requires no reply under the Civil Rules, and is therefore denied.

43. All allegations in the Complaint not specifically admitted above are denied.

II. DEFENSES

By way of further answer to the Complaint, and as further defenses, this defendant-intervenor alleges:

44. The Complaint fails to state a claim upon which relief can be granted.

45. To the extent the Complaint alleges "as applied" rather than "facial" invalidity of the upcoming September 2005 primary, this action is prematurely brought.

46. To the extent that the Complaint alleges any sort of trademark or tradename type protection of the party "label", the Complaint's allegations are barred by, e.g., the doctrines of laches, waiver, and estoppel. To the extent that these plaintiffs are alleging rights based on their alleged national "trademark" of the libertarian label, this defendant-intervenor further answers that these

plaintiffs have not pled or demonstrated their prior conduct protecting that label from unauthorized use under the trademark laws.

47. To the extent that the Complaint alleges any sort of equitable protection of the party "label" or entitlement to a Court Order imposing the previously existing "Montana" primary system upon the State of Washington, the Complaint's allegations are barred by, e.g., the doctrines of unclean hands.

III. PRAYER FOR RELIEF

Having fully Answered the Complaint, this defendant-intervenor respectfully requests the following relief from this Court:

1. Entry of a judgment dismissing the Complaint with prejudice, and denying the Complaint's requested injunctive, declaratory, and other relief;

2. Entry of a judgment declaring that Washington's election law as established by Initiative 872 does not deprive the plaintiffs of any legally cognizable rights protected by the constitution or laws of the United States or the State of Washington;

3. Entry of a judgment awarding defendant-intervenor recovery of its costs and attorney fees to the full extent allowed by law;

4. Permission to amend the pleadings to add additional matters verified during discovery or to conform to the evidence offered at the time of hearing or trial; and

5. Such other relief as the Court deems proper, just, or equitable.

RESPECTFULLY SUBMITTED this 10th day of June, 2005.

FOSTER PEPPER &
SHEFELMAN PLLC

Thomas F. Ahearne, WSBA No. 14844
Attorneys for Defendant-Intervenor
WASHINGTON STATE GRANGE

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEOMCRATIC CENTRAL COMMITTEE, et al., Plaintiff Intervenors LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Intervenors v. DEAN LOGAN, King County Records & Elections Division Manager, et al., Defendants, STATE OF WASHINGTON, et al., Defendant Intervenors WASHINGTON STATE GRANGE, Defendant Intervenors.	NO. CV05-0927Z WASHINGTON STATE GRANGE'S ANSWER TO PLAINTIFF REPUBLICANS' COMPLAINT

I. ANSWER

In answer to the Complaint For Declaratory Judgment And For Injunctive Relief Regarding Initiative 872 And Primary Elections ("Complaint") alleged by the plaintiff Republicans in this case, the defendant-intervenor Washington State Grange answers and alleges as follows:

1. The allegations in paragraph 1 of the Complaint assert self-serving legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied. Moreover, those assertions are not even an accurate summary or characterization of the law.

2. The allegations in paragraph 2 of the Complaint assert self-serving legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied. Moreover, the assertions relating to "the selection of a political party's candidates and nominees" are irrelevant to this suit, because the primary system established by the voters' overwhelming enactment of Initiative 872 does not select the candidate or nominee for any *political party*. Instead, it determines the two candidates or nominees for the *general election ballot*.

3. This defendant-intervenor admits that our State's voters overwhelmingly enacted Initiative 872, which became effective on or about December 2, 2004. The remaining allegations in paragraph 3 of the Complaint assert self-serving legal arguments and legal conclusions concerning that enactment, rather than allegations of fact, and therefore need not be admitted or denied. Moreover, those assertions are not even an accurate summary or characterization of the law.

4. For the reasons set forth in this Answer, this defendant-intervenor denies the assertions and allegations in paragraph 4 of the Complaint.

5. This defendant-intervenor denies the assertions in paragraph 5 that "Initiative 872 is unconstitutional" and that "this is an action to protect the First Amendment rights of the Party and

its adherents to advocate and promote their vision for the future without censorship or interference by the State and County Auditors". Instead, this is an action by the Political Parties to quash the First Amendment and political speech rights of persons running for public office, to nullify the right of Washington voters to enact their laws by Initiative, and to entice judicial activism by demanding that this federal court impose the type of primary system that the Political Parties could not succeed in getting our State Legislature or our State's voters to enact.

6. This defendant-intervenor admits that this case involves a federal question and that jurisdiction is proper in this Court. The remaining allegations in paragraph 6 of the Complaint assert self-serving legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied.

7. This defendant-intervenor admits that venue lies within this Western District of Washington at Seattle.

8. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the Complaint, and therefore denies them. Moreover, what is intended by several allegations in this paragraph (e.g., those relating to "powers inherent" and "functions inherent" in a political party) are too vague to meaningfully admit or deny.

9. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the

allegations in paragraph 9 of the Complaint, and therefore denies them.

10. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 of the Complaint, and therefore denies them.

11. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of the Complaint, and therefore denies them.

12. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 of the Complaint, and therefore denies them.

13. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13 of the Complaint, and therefore denies them.

14. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14 of the Complaint, and therefore denies them.

15. This defendant-intervenor admits the defendant County Auditors named in paragraph 15 of the Complaint have the responsibilities provided by Washington law. On information and believe, this defendant-intervenor also admits the residence location of those Auditors as alleged in paragraph

15. In further Answer to the Complaint's identification of the defendants in paragraph 15, this defendant-intervenor notes that the Court has granted the State of Washington, the Washington Secretary of State Sam Reed, the Washington Attorney General Rob McKenna, and the Washington State Grange permission to intervene in this action as defendant-intervenors. The defendant-intervenor Washington State Grange was the proponent of Initiative 872.

16. This defendant-intervenor admits that the primary established by Initiative 872 will be conducted in September 2005, but at this time is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16 of the Complaint concerning the County Auditor quotation stated in the last sentence of that paragraph. The remaining allegations in paragraph 16 assert self-serving legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied. Those assertions, moreover, are not even an accurate summary or characterization of the law – for they set forth quotations out of context and without acknowledgment of provisions superceded by Initiative 872. More specifically, the election system established by the voters' adoption of Initiative 872 defines "partisan office" as "a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name", and establishes that "any party or independent preferences are shown for the information of voters only". [Initiative §4 & §7(3).]

Contrary to the legal arguments asserted in this paragraph of the Complaint, the primary system established by the voters' adoption of Initiative 872 does *not* select the candidate or nominee for any political party, but rather determines the two candidates or nominees for the general election ballot, while allowing each candidate to disclose to the voters his or her own political party preference.

17. For the reasons set forth in this Answer, this defendant-intervenor denies the assertions and allegations in paragraph 17 of the Complaint.

18. For the reasons set forth in this Answer, this defendant-intervenor denies the assertions and allegations in paragraph 18 of the Complaint.

19. This defendant-intervenor admits that Initiative 872 and the voters pamphlet referred to in paragraph 19 speak for themselves. The remaining allegations in paragraph 19 assert self-serving legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied. Those assertions, moreover, are not even an accurate summary or characterization of the law. Contrary to the legal arguments asserted in this paragraph of the Complaint, the primary system established by the voters' adoption of Initiative 872 does *not* select the candidate, nominee, or "standard-bearer" for any *political party*. Instead, it determines the two candidates or nominees for the *general election ballot*.

20. The legal argument asserted in paragraph 20 of the Complaint is too vague to determine if it contains a factual allegation to be admitted or denied, and this defendant-intervenor accordingly denies it.

21. The allegations in paragraph 21 of the Complaint primarily assert self-serving legal arguments and legal conclusions rather than allegations of fact. Moreover, this paragraph's arguments relating to "the adulteration of the Party's nomination process" are irrelevant to this suit, because the primary system established by the voters' overwhelming enactment of Initiative 872 does not select the candidate or nominee for any *political party*. Instead, it determines the two candidates or nominees for the *general election ballot*. Moreover, the arguments in this paragraph relating to "candidates' messages" and the political parties' complaints about the prospect of the voters (rather than the Political Parties) selecting the two candidates for the general election ballot confirm this defendant-intervenor's prior observation that this is really an action by the Political Parties to quash the First Amendment and political speech rights of persons running for public office, and to secure from this federal court the type of primary system that the Political Parties could not succeed in getting our State Legislature or our State's voters to enact.

22. The allegation in paragraph 22 of the Complaint asserts a self-serving legal argument and legal conclusion rather than an allegation of fact, and therefore need not be admitted or denied. Moreover, that assertion is not even an accurate summary or characterization of the law since it ignores the superceding effect of the enactment of Initiative 872.

23. The allegations in paragraph 23 of the Complaint assert self-serving legal arguments and legal conclusions rather than allegations of fact, and therefore need not be admitted or denied. Moreover,

those assertions are not even an accurate summary or characterization of the law since they ignore the superceding effect of the enactment of Initiative 872. The election system established under Initiative 872 does not deny the plaintiff equal protection of the law as suggested by the section heading above this paragraph of the Complaint.

24. The *Reed* decision selectively quoted and characterized in paragraph 24 of the Complaint speaks for itself, and therefore that paragraph's self-serving partial characterization of that Court decision is denied.

25. The *Jones* and *Reed* decisions selectively quoted and characterized in paragraph 25 of the Complaint speak for themselves, and therefore that paragraph's self-serving partial characterization of those Court decisions is denied.

26. This defendant-intervenor denies the allegations in the first sentence of paragraph 26, and in response to the second sentence admits that the Initiative and voters pamphlet speak for themselves.

27. At this time, this defendant-intervenor is currently without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 27 of the Complaint, and therefore denies them. In any event, however, this paragraph's allegation concerning "candidates of the Party" is irrelevant to this suit, because the primary system established by the voters' overwhelming enactment of Initiative 872 does not select the candidate of any *political party*. Instead, it determines the two candidates or nominees for the *general election ballot*.

28. The allegations in paragraph 28 of the Complaint concerning plaintiffs' "rights" assert self-serving legal arguments and legal conclusions rather than allegation of fact, and therefore need not be admitted or denied. For the reasons set forth in this Answer, this defendant-intervenor denies the remaining allegations in paragraph 28 of the Complaint.

29. The allegations in paragraph 29 of the Complaint concerning plaintiffs' "rights" assert self-serving legal arguments and legal conclusions rather than allegation of fact, and therefore need not be admitted or denied. For the reasons set forth in this Answer, this defendant-intervenor denies the remaining allegations in paragraph 29 of the Complaint.

30. This defendant-intervenor realleges and incorporates by reference its above answers to the paragraphs that the Complaint realleges and incorporates in paragraph 30.

31. This defendant-intervenor admits a controversy exists concerning the Complaint's claim that our State's primary system under Initiative 872 is unconstitutional, but for the reasons previously noted in this Answer, denies the remaining allegations and assertions in paragraph 31 of the Complaint.

32. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 32 of the Complaint.

33. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 33 of the Complaint.

34. This defendant-intervenor admits that Initiative 872 does not have an express severability clause, but denies the assertion in paragraph 34 of the Complaint that the *entire* Initiative is therefore void if *any portion* of it is unconstitutional.

35. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 35 of the Complaint. Moreover, the attorney fee provision alleged does not apply to recovery against this defendant-intervenor.

36. This defendant-intervenor realleges and incorporates by reference its above answers to the paragraphs that the Complaint realleges and incorporates in paragraph 36.

37. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 37 of the Complaint.

38. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 38 of the Complaint.

39. This defendant-intervenor realleges and incorporates by reference its above answers to the paragraphs that the Complaint realleges and incorporates in paragraph 39.

40. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 40 of the Complaint.

41. This defendant-intervenor denies the allegations in paragraph 41 of the Complaint. Moreover, the attorney fee provision alleged does not apply to recovery against this defendant-intervenor.

42. This defendant-intervenor realleges and incorporates by reference its above answers to the paragraphs that the Complaint realleges and incorporates in paragraph 42.

43. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 43 of the Complaint.

44. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 44 of the Complaint.

45. For the reasons previously noted in this Answer, this defendant-intervenor denies the allegations in paragraph 45 of the Complaint.

46. This defendant-intervenor denies the allegations in paragraph 46 of the Complaint. Moreover, the attorney fee provision alleged does not apply to recovery against this defendant-intervenor.

47. The Complaint's Prayers For Relief require no reply under the Civil Rules, and are therefore denied.

48. All allegations in the Complaint not specifically admitted above are denied.

II. DEFENSES

By way of further answer to the Complaint, and as further defenses, this defendant-intervenor alleges:

49. The Complaint fails to state a claim upon which relief can be granted.

50. To the extent the Complaint alleges "as applied" rather than "facial" invalidity of the

upcoming September 2005 primary, this action is prematurely brought.

51. To the extent that the Complaint alleges any sort of trademark or tradename type protection of the party "label", the Complaint's allegations are barred by, e.g., the doctrines of laches, waiver, and estoppel.

52. To the extent that the Complaint alleges any sort of equitable protection of the party "label" or entitlement to a Court Order imposing the previously existing "Montana" primary system upon the State of Washington, the Complaint's allegations are barred by, e.g., the doctrines of unclean hands.

53. All allegations in the Complaint not specifically admitted above are denied.

III. PRAYER FOR RELIEF

Having fully Answered the Complaint, this defendant-intervenor respectfully requests the following relief from this Court:

1. Entry of a judgment dismissing the Complaint with prejudice, and denying the Complaint's requested injunctive, declaratory, and other relief;

2. Entry of a judgment declaring that Washington's election law as established by Initiative 872 does not deprive the plaintiffs of any legally cognizable rights protected by the constitution or laws of the United States or the State of Washington;

3. Entry of a judgment awarding defendant-intervenor recovery of its costs and attorney fees to the full extent allowed by law;

4. Permission to amend the pleadings to add additional matters verified during discovery or to conform to the evidence offered at the time of hearing or trial; and

5. Such other relief as the Court deems proper, just, or equitable.

RESPECTFULLY SUBMITTED this 10th day of June, 2005.

FOSTER PEPPER &
SHEFELMAN PLLC

Thomas F. Ahearne, WSBA No. 14844
Attorneys for Defendant-Intervenor
WASHINGTON STATE GRANGE

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Intervenors, LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Intervenors, vs. DEAN LOGAN, King County Records & Elections Division Manager, et al., Defendants, STATE OF WASHINGTON, et al., Defendant Intervenors, WASHINGTON STATE GRANGE, Defendant Intervenors.	**No. CV05-0927-TSZ** **STIPULATED STATEMENT OF LEGAL ISSUES**

The undersigned, on behalf of the plaintiffs and plaintiff intervenors and the defendants and

defendant intervenors, respectively, have met and conferred and hereby stipulate that the following legal issue will be addressed in the parties' cross-motions for summary judgment, in the order stated:

1. Does the primary system established by Initiative 872 nominate political party candidates for public office?

2. If the primary system under Initiative 872 does not nominate political party candidates for public office, does each political party have the right to select for itself the only candidate who will be associated with it on either a primary or general election ballot?

3. If the primary system under Initiative 872 nominates political party candidates for public office, does Initiative 872 violate the First Amendment by compelling a political party to associate with unaffiliated voters and members of other political parties in the selection of its nominees?

4. Does Washington's filing statute impose forced association of political parties with candidates in violation of the parties' First Amendment associational rights?

5. Does Initiative 872's limitation of access to the general election ballot to only the top two vote-getters in the primary for partisan office unconstitutionally limit ballot access for minor political parties?

The political parties may address an additional issue related to ballot access that the

parties to this lawsuit could not reach agreement upon. The Libertarian Party may address additional issues unique to its status as a minor political party.

DATED this 10th day of June, 2005.

John J. White Jr.

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U.S. District Court

WESTERN DISTRICT OF WASHINGTON

Notice of Electronic Filing

The following transaction was received from CC, entered on 6/14/2005 at 11:16 AM PDT and filed on 6/7/2005

Case Name: Washington State Republican Party et al v. Logan et al

Case Number: 2:05-cv-927

Filer:

Document Number: 45

Docket Text:

MINUTE ENTRY for proceedings held before Judge Thomas S. Zilly - Dep Clerk: *KC;* Pla Counsel: *John White, Kevin Hansen, David McDonald;* Def Counsel: *Jim Pharris, Tom Ahearne, Mike Sullivan, David Alvarez, James Baker, Ronald Marshall, Tom Kuffel, Tad Seder, Gordon Sivley, Stew Menefee, Quinn Posner, Richard Shepard, Steven Kinn;* CR: *Sue Palmerton;* **Status Conference** held on 6/7/2005. The Court grants motion to intervene by State of Washington, docket no. 22. The Court grants motion to intervene by Washington State Democratic Central Committee, docket no. 2. The Court grants Libertarian party's motion to intervene, docket no. 3. The Court grants the oral motion to intervene by Washington State Grange. The following briefing schedule is adopted: opening brief to be filed by June 17,2005. Responsive brief to be filed by July 1,2005. Reply brief to be filed by July 6, 2005. The opening brief shall not exceed 40

pages. Responsive brief shall not exceed 50 pages. The reply brief shall not exceed 12 pages. A hearing is scheduled W ed., JULY 13, 2005 at 9:00 a.m. The Court directs counsel to submit a written report by close of business Friday, June 10,2005 stating the issues. In the event any party wishes a status conference, they may contact the clerk. The Court continues the motion for preliminary injunction to July 13, 2005 (docket no. 7).(CC,)

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, v. DEAN LOGAN, King County Records & Elections Division Manager, et al., Defendants, WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff-Intervenors, LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff-Intervenors, STATE OF WASHINGTON, et al., Defendant-Intervenors, WASHINGTON STATE GRANGE, Defendant-Intervenors.	No. C05-0927Z DECLARATION OF PAUL J. BERENDT IN SUPPORT OF PLAINTIFF-INTERVENOR WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S MOTION FOR SUMMARY JUDGMENT **Noted for Oral Argument:** **July 13, 2005**

I am over the age of 18 years, a U.S. citizen, resident of the State of Washington, and the elected Chair of the Washington State Democratic Central Committee, the governing body of the Washington State Democratic Party ("Party"), and the political and administrative head of the Party pursuant to its Charter and Bylaws. I am also the elected Chair of the Washington State Democratic Committee as defined in RCW 29A.80.020. I have firsthand knowledge of the matters stated herein and if called to testify, could and would competently do so.

1. I have been directly involved in Party affairs and partisan elections in Washington State for over twenty years. In that time I have participated in the planning and execution of many campaigns and observed many more. I am well aware of the practical effects of Washington's primary statutes upon campaigns and upon the Party.

2. From 1980-1982, I worked in the office of the State Chair. My duties included assisting in all aspects of party-building and in the recruitment and support of candidates for public office who would be affiliated with the Party. From 1983-1988, I worked as a legislative policy analyst in the State House of Representatives. From 1989-1992, I worked for the Senate Democratic Caucus in Olympia providing policy analysis and legislative support. During 1993 and 1994, I was a self-employed political consultant specializing in State Legislative campaigns. Since January 1995, I have been the head of the Party in Washington and have been directly involved in all aspects of the Party's organization and its attempts to achieve its goals.

3. Based upon my experience and observation, it is my opinion that the primary system imposed upon the Party by Initiative 872 will materially interfere with the Party's achievement of its goals and will place substantial burdens upon the Party.

4. The Party has several fundamental goals, including rallying its members around common issues, articulating to the general populace through its standard bearers the merits of those issues in order to expand support for those issues and to expand the Party's base, electing candidates who support the Party's issues and working with those candidates after election to translate the Party's issues into government policy. The Party is organized according to its Charter and in conformance with the Charter of the Democratic Party of the United States. The goals of the Democratic Party are set forth in its Charter. The Charter was adopted by the Party at its Convention in 1976 and was last amended in 2004. The Charter defines the reasons the Party exists, the membership of the Party, its basic organization and the basic principles for which it stands and which are fundamental to its character. A copy of the Charter in its current form is attached to my declaration as Exhibit A.

5. The Party is composed of "...All residents of the State of Washington who are willing to support the principles and goals of the Democratic Party as expressed in the Charter and wish to be known as Democrats." Charter, Article I.B. The goals of the Party include adopting statements of policy to serve as standards for Democratic elected

officials and goals for the people of the state, nominating and assisting in the election of Democratic candidates at all levels who support the goals of the Party, and working with elected Democratic public officials at all levels to achieve the goals of the Democratic Party. The close relationship contemplated by the Charter is fostered by requiring that the selection of candidates using the party name be done by voters who affiliate with the Democratic Party. Charter, Article VII.(C) (as amended). The Democratic Party, through its state and local conventions, develops and publishes its positions on various issues in advance of the candidate filing period for primary and general elections.

6. In furtherance of its political strategies and Charter goals, the Party has adopted Nominating Rules. A copy of the Nominating Rules in their current form is attached as Exhibit B. Under Initiative 872, our general election candidates are chosen in a public primary but the election officials charged with administering the primary are barred from limiting participation in our primary to those who affiliate with the Democratic Party.

7. The primary system contemplated under Initiative 872, with its open voting and ability for multiple candidates to run under the Democratic label without consent from the Party or selection in accordance with its Charter substantially interferes with the Party's pursuit of its political strategies and Charter-defined goals. . n all fundamental ways that are important to the Party, Initiative 872 is indistinguishable from Washington's previous "blanket" primary that was invalidated by the Ninth Circuit Court of Appeals in 2003. Like the previous

blanket primary, Initiative 872: (1) allows candidates to self-select their party identification when filing for office, without the participation of the political parties; (2) identifies candidates on the primary ballot with their party affiliation; (3) allows primary voters to select the candidates who will advance to the general election for any office without regard to party affiliation of the voter; (4) allows the use of an open, consolidated primary ballot that is not limited by political party and that facilitates crossover voting; and (5) advances major party candidates from the primary to the general election based on open, "blanket" voting.

9. In addition, by allowing only the "top two" vote getters to advance to the general election ballot, Initiative 872 further dilutes and weakens the Party's ability to effectively communicate its message and maintain Party loyalty. This scheme may well restrict the choices legitimately available to voters on their general election ballots. For example, when multiple Democratic candidates appear on a primary ballot, in some cases this will "split" the overall Democratic vote sufficiently to allow no Democratic candidate to advance to the general election, even when the Party as a whole receives majority support in the primary. If four Democratic candidates split 60% of the primary vote, and two Republican candidates split the remaining 40%, the two Republicans would advance. As a result, Initiative 872 strongly discourages the Party from putting forth multiple candidates to compete in a primary election on the one hand but on the other makes it impossible for the Party to avoid having multiple candidates under its banner by forcing the

Party to accept self-starters and mischief making partisans from other parties who file under false colors.. This limiting effect will dilute or restrict voter exposure to Party candidates and will impede intra-Party debate on the issues. Given that electoral politics is one of the primary ways that the political parties advocate for and advance their goals and ideals, the restriction on general election ballot access further burdens the Party in the exercise of its First Amendment prerogatives.

10. Allowing political candidates to self-select Democratic Party identification for the primary ballot will harm the Party in other ways. The Party has expended considerable time and expense to develop a coherent set of goals and principles that guide the Party, and to create a corresponding "brand awareness" among the electorate for candidates identified as Democrats. Allowing any candidate, even those that are hostile to the Party, to misappropriate the Party name and appear on the ballot as a Democratic candidate will undermine this name association that has built up in loyal Party voters' mind. I am aware of at least one prior candidate for public office, long time Republican activist Thomas Lowry, who had sought the Democratic nomination for the State Legislature because of the difficulty he perceived in challenging the Republic incumbent in the blanket primary. He ran for and won the Democratic nomination twice, without ever speaking to a Democratic Party group or obtaining and Democratic endorsements. Initiative 872, by allowing such "raider" candidacies to continue, will dilute the Party's ability to maintain

a coherent message using the valuable Democratic Party name.

11. The requirement that Democratic candidates be selected by voters who affiliate with the Democratic Party, at least for primary day, is fundamental to the Party's ability to achieve its goals. It allows the Party to mobilize its voters and stronger supporters while avoiding the damaging effects of allowing supporters of other parties to influence, perhaps even determine, the selection of our candidates. Because it prohibits implementation of this basic policy, Initiative 872 greatly obstructs the Party's furtherance of its goals.

12. The damage that will be done to the Party by the Initiative 872 primary system is not limited to permitting ticket-splitters to select the Party's candidates. In many cases the selection of our candidates will be affected by voters from opposition parties, and our voters will likely affect the selection of the other party's candidates. I am told by my own Party members that this has happened under the old blanket primary system in jurisdictions which are perceived as being extremely difficult for my Party's candidates to win. Because my Party's voters have the option to vote in the other party's primary, and perceive that that party's primary is "where the choice will be made," they opt to vote in the other party's primary, depriving their own candidates of support. The Party's candidates, having been deserted, do even worse in the primary than the Party's base of support and it soon becomes much more difficult, if not impossible, to recruit strong candidates who might build the minority party into a competitive party. I do not doubt that

my counterpart Chair experiences similar difficulties in mobilizing support in his party.

13. On June 26, 2000, the United States Supreme Court ruled that the California blanket primary was unconstitutional. In support of its decision, the opinion stated that as many as 25 percent of voters in Washington cross-over to participate in another party's primary. These cross-over voting figures are consistent with my experience as a Party official and with demographic analyses of past primary returns that I have seen used by candidates in targeting their efforts. If the Initiative 872 primary is allowed to proceed there is every reason to expect that the same level of cross-over voting will occur since the primary is, for all intents and purposes, the same as the blanket primary from the voter's point of view.

14. It is not only the Party that suffers as a result of the current primary system: The public as a whole suffers because the primary will result in less choices for the voter. Rather than a general election devoted to choosing between candidates representing competing philosophies, the public will often find itself presented with a general election in which it cannot tell the difference between the philosophies of the candidates, no matter what party label they carry. A major cause of this, in my opinion, is that the candidates of both parties will be required to spend most of their time campaigning to the same small group of ticket-splitters rather than to their respective philosophical bases.

15. The burdens placed upon our party building by the Initiative 872 primary system are

cumulative. Each passing year will be worse than the one before as candidates will increasingly focus their efforts on ticket-splitters and non-members of our Party. Consequently, candidates selected through Initiative 872 to be Democratic standard bearers will sometimes vary from or contradict the positions officially taken by the Party to a far greater extent than would occur if those candidates selected in primaries in which participation is limited to voters who support the Democratic Party. This will result in a misapprehension of the Party's position on various issues. Over time, the Party's message will become further blurred and it is more difficult for voters to perceive a benefit from

electing a Democrat as opposed to a member of another party.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 17th day of June, 2005 at Seattle, Washington.

_____

Paul Berendt
Chair, Washington State
Democratic Party

EXHIBIT A

Charter of the Democratic Party of the State of Washington

(As Amended by State Convention 6/5/2004)

Preamble

We, the Democrats of the State of Washington, believe in the concepts expressed in the Declaration of Independence and the Constitution of the United States – that all power to govern resides with the people. In accordance with the National Charter of the Democratic Party of the United States, we organized and pledge ourselves to promote a truly representative Party open to all who support its principles.

We further pledge to make every effort to encourage maximum participation in the political process and to protect individuals' rights, civil liberties, our environment and social and economic justice for all.

Upon these basic principles we do hereby adopt this Charter of the Democratic Party of the State of Washington.

Article I

Democratic Party of the State of Washington

A. The Democratic Party of the State of Washington exists to:

1. Adopt and promote statements of policy to serve as standards for Democratic elected officials and goals for the people of the state.
2. Nominate and assist in the election of Democratic candidates at all levels who support the goals of the Party.

3. Administer the Party organization in accordance with rules and standards which will facilitate achieving the goals of the Party.
4. Establish standards and rules of procedure to afford all members of the Democratic Party full, timely and equal opportunities to participate in decisions concerning the selection of candidates, the formulation of policy, and the conduct of other Party affairs without discrimination on the basis of sex, race, age (except where state and federal law precludes participation), religion, sexual orientation, economic status or ethnic origin.
5. Promote fair campaign practices and fair adjudication of disputes.
6. Raise and disburse monies needed for the continuing operation of the Party.
7. Work with the elected Democratic public officials at all levels to achieve the goals of the Democratic Party.
8. Encourage and support codes of political ethics governing all public officials in the conduct of their offices.
9. Encourage voter registration and voting.

B. The Democratic Party of the State of Washington shall be composed of:

1. Democratic precinct committee officers.
2. Elected Democratic officials.

3. Members of Democratic county, legislative district, congressional district and state Party organizations.
4. All residents of the State of Washington who are willing to support the principles and goals of the Democratic Party as expressed in the Charter and wish to be known as Democrats.
5. Members of those Democratic organizations that are recognized or chartered by the state central committee.

Article II

State Democratic Convention

A. The State convention is the highest authority of the Democratic Party of the State of Washington, subject to the provisions of this Charter.

B. The purpose of the convention shall be to adopt a state Party platform and to perform such functions as are inherent to such an organization.

C. The State Democratic Convention shall be called by the state central committee once every two (2) years.

D. The state convention shall adopt its own rules.

Article III

Washington State Democratic Central Committee

A. The Washington State Democratic Central Committee, also called "state central committee" shall be the governing body of the Democratic Party of the State of Washington.

B. Members. The state central committee members shall be the state committeewoman and state committeeman elected by each county central committee and by each legislative district organization. Members shall be elected to terms of two (2) years. They shall have an equal voice and vote. In the event that a county central committee or a legislative district organization fails to elect such a representative, the chair (or the chair's designee) shall be the representative on the state central committee.

C. Special Members. In addition, the state central committee shall have Special Members. Except in the election of officers and on the adoption or amendment of charter or bylaws, special members shall have equal voice and vote as other members in affairs of the state central committee when in personal attendance. Special Members have no proxy. The Special Members of the state central committee shall be:

1. The National Committee members elected from the State of Washington;
2. The Governor of the State of Washington if the Governor is a Democrat;
3. United States Senators from the State of Washington if Democrats;
4. United States Representatives from the State of Washington if Democrats;
5. The Leader of the Washington State Democratic Caucus;
6. The Leader of the Washington State House of Representatives Democratic Caucus;

7. A representative of the Young Democrats of Washington;

8. A representative of the Federated Democratic Women's Clubs;

9. Elected officers of the state central committee; and

10. The Chair of the Organization of County and District Chairs. In the case of the Chair of the Organization of County and District Chairs, the vice Chair of that organization may serve as the chair's alternate with vote.

D. Organizational meeting. The state central committee shall hold its organization meeting in the first quarter of each odd-numbered year, following legislative district and county organizational meetings. The outgoing Chair of the Democratic Party of the State of Washington shall issue the call to the organizational meeting. In the absence of such a call, any ten (10) members of the state central committee may call and convene the organizational meeting. Timely notice shall be sent to all members. At its organizational meeting, the state central committee shall elect a chair who shall be known as the Chair of the Democratic Party of the State of Washington (and also called the "state chair"). At this meeting, the state central committee shall also elect a vice chair and such other officers specified in the bylaws, or in the rules of the state central committee.

E. Meetings, officers, finances.

1. The state central committee shall meet at least four (4) times per year.

2. The officers of the state central need not be members of the committee. Officers of the outgoing state central committee, unless otherwise qualified, shall not vote in the election of new officers.

3. The National Committeemen and Committeewomen shall be elected by the state central committee for terms of four (4) years during each Presidential election year.

4. The state central committee shall be the sole Party organization authorized to collect and disburse funds in behalf of the Democratic Party of the State of Washington, except as otherwise authorized by the state convention. It shall report the financial conditions of the Party at each state convention as well as the political activities of the state Party since the previous state convention.

Article IV

Statutory State Committee

A. The statutory state committee shall be organized according to state law (RCW 29.42.020).

B. It shall perform only those duties explicitly specified by RCW 29.42.020 (1) through (4). The statutory state committee shall adopt bylaws which shall delegate those duties to the state central committee which shall provide that the Chair of the Democratic Party of the State of

Washington shall be the chair of the statutory state committee and that the Vice Chair elected by the state central committee shall be the vice chair of the statutory state committee.

C. The statutory state committee shall be subject to the overriding Party authority of this Charter, the state convention, and of the Washington State Democratic Central Committee.

Article V

Other Organizations or Elected Officials Authorized to Function Continuously

A. General: These organizations and officials, along with the state central committee, are authorized by, state statute, charter, or custom to function continuously to govern Party affairs and to make Party policy; they are not directly involved in selecting delegates. All such organizations shall be constituted and shall conduct business according to this Charter and other provisions adopted pursuant to the authority of this Charter. State laws relating to Party operations shall be observed unless in conflict with this Charter and other provisions adopted pursuant to this Charter.

B. Precinct committee officers

1. Precinct committee officers shall be elected, appointed, or recalled according to state law, this Charter and other provisions adopted pursuant to the authority of this Charter.

2. Vacancies in the office of precinct committee officer that exist because of failure to elect at state general election shall not be filed until

after the reorganization of the county central committee and/or legislative district organization.

3. Vacancies that occur in this office by reason of death, resignation, permanent change of residence, change of voter registration from the precinct, by recall of the incumbent, or because of failure to elect, shall be filed by appointment according to a procedure that affords every Democrat registered to vote in the precinct fair and equal opportunity.

C. Legislative District Organizations

1. The legislative district organization shall be the governing body of the legislative district Democratic party and shall have the responsibility for conducting Party affairs at the legislative district level. It shall be composed of all elected and appointed precinct committee officers.

2. Each legislative district organization shall be organized according to state law, the Charter and Bylaws of the Democratic Party of the State of Washington, and other provisions adopted pursuant to the authority of the Charter.

D. County Central Committee

1. The county central committee shall be the governing body of the county Democratic Party and shall have the responsibility for conducting Party affairs at the county level. It shall be composed of all elected and appointed precinct committee officers.

2. Each county central committee shall be organized according to state law, the Charter and Bylaws of the Democratic Party of the State of Washington, and other provisions adopted pursuant to the authority of the Charter.

3. In counties with legislative district organizations, the county central committee may establish a county executive board. Such a board shall be fairly apportioned.

E. Congressional District Organizations

1. Any congressional district may organize for purposes consistent with this Charter.

F. Judicial Review Board

1. A Judicial Review Board shall be established.

2. It shall consist of two (2) members elected by each congressional district caucus during each state convention. State committee members, county chairs, and district chairs shall not be eligible to serve.

3. Members of the board shall take office the following January 1st and shall serve for two (2) years.

4. A quorum shall be 60% of the members and no proxies or alternates shall be allowed.

5. Vacancies shall be filled by election by a caucus of the state central committee members from the congressional district having a vacancy.

6. This board shall consider questions of interpretation of the Charter, bylaws, delegate selection rules, affirmative action plans, and other adopted rules of the Democratic Party of the State of Washington and its component organizations. It shall make its recommendations in writing to each state convention before the convention votes on any of its recommendations and before new members are elected to the board.

7. The board shall not function as a credentials or rules committee, although its findings and recommendations shall be considered relevant evidence in a credentials challenge.

Article VI.

Party Organization Convened Periodically

A. General

1. All periodic organizations are part of the delegate selection process.

2. In addition to the selection of delegates, caucuses and conventions, except congressional district caucuses, may adopt platforms and resolutions as desired, and perform other functions inherent in such an organization.

3. The national and state platforms and resolutions shall serve as the policy standards for the state Democratic Party. The national, state, county and legislative district platforms and resolutions shall serve as policy standards for the county and legislative district Democratic Party organizations.

4. Caucuses and conventions shall meet in even-numbered years.

B. Delegate Selection Rules

1. Delegate selection rules adopted by the state central committee shall govern the precinct, legislative district and congressional district caucuses, and county and state conventions.

2. Delegate selection rules adopted by any Democratic Party organizations shall conform to this Charter and the Charter, By-Laws and Delegate Selection Rules of the Democratic party of the United States. State laws relating to the selection of delegates to the National Convention shall be observed unless in conflict with the national or State Charters or other provisions adopted pursuant to those Charters.

3. Any Democrat has the right to challenge any delegate or alternate to the county and state conventions or to the legislative and congressional district caucuses in accordance with the rules. No challenged delegate may vote on any matter pertaining to his or her own challenge.

C. Precinct Caucuses

1. Precinct caucuses shall elect delegates to the county convention and/or legislative district caucuses.

2. Precinct caucuses shall be held in accordance with pertinent rules; the state chairperson shall issue the call to the caucus.

3. There shall be no registration free nor collection of money before or during a caucus, except that voluntary contributions may be solicited or collected..

D. Legislative District Caucuses

1. The legislative district caucus shall elect delegates to the state convention. The same delegates shall also attend the appropriate congressional district caucus, if applicable.

2. The legislative district caucuses shall be composed of delegates elected at the precinct caucuses.

E. County Conventions

1. The county convention shall be composed of delegates elected at the precinct caucuses.

2. The county convention shall adopt a county platform and elect delegates to the congressional district caucus and state convention if delegates are to be elected at the county convention.

F. Congressional District Caucus

1. The congressional district caucus shall elect the maximum number of National Convention delegates permitted by National Delegate Selection Rules.

2. Congressional district caucuses shall be composed of delegates to the state convention.

Article VII

Basic Principles

A. Open Party

1. The Democratic Party of the State of Washington shall be open to all who support the Party and wish to be known as Democrats.
2. All members of the Party shall enjoy equal rights, protections, and opportunities in all governing documents and in all proceedings of the Party at all levels.
3. Discrimination on the basis of sex, race, age (except state and federal law precludes participation), religion, sexual orientation, economic status or ethnic origin is prohibited in the conduct of Party affairs at all levels.
4. To the greatest extent possible all representatives shall be chosen from elected members.
5. The time, the place, and a description of the legal and practical procedures of all delegate selection and policy making or governance meetings shall be publicized fully and in a manner to assure timely notice to all interested persons.

B. Full Participation

1. The Democratic Party of the State of Washington reaches out and seeks to bring all people and ideas into its affairs.
2. In order to encourage full participation by all Democrats of the State of Washington with

particular concern for minority groups, in the delegate selection process and in all Party affairs, the state and county Democratic Party organizations shall adopt and implement affirmative action programs.

3. Affirmative Action: Performance under an approved Washington State affirmative action program shall be considered relevant evidence in the challenge of any county delegation. If a county has adopted and implemented an approved and monitored state affirmative action program, the county and legislative district shall not be subject to challenges based solely on delegate composition. This goal shall not be accomplished either directly or indirectly by the imposition of mandatory quotas at any level of the selection process or in any Party affairs, as defined in the bylaws.

C. Fair Representation

1. In elections at all levels of the Party in which Party policy is determined or in which delegates, officers other Party officials, and nominees for public office are to be selected, procedures shall:

   a. Provide full, equal, timely participation;

   b. Assure fair, proportional representation of preference;

   c. Prohibit the unit rule; not require delegates to vote as a majority determines;

   d. Prohibit winner-take-all selections until the highest possible level of selection;

e. Not deny participation for failure to pay a cost, fee or poll tax;

f. Provide whenever possible for direct and not secondary elections.

2. The Democratic Party organization which is closest to the electorate and which encompasses the constituency of a public office shall select the nominees to fill a vacancy in that Party office.

3. Democratic nominees, candidates and delegates shall be selected by Democrats; provided that in furtherance of the Party's goal bringing people and ideas into its affairs, the bylaws of the Party may authorize the participation in the selection of nominees and candidates for public office of voters who do not wish to publicly become members of the party."

D. Majority Rule

1. Majority vote shall prevail in proceedings of this party except when otherwise specified by statute, this Charter, bylaws or rules of order.

2. Majority vote shall permit those in the majority to organize a body, but those in the majority shall respect rights of those in the minority and take care not to exclude them from the organization.

3. Minority reports shall be considered and published whenever they are supported by a substantial minority, as defined by the bylaws or other rules.

E. Accountability

1. Those elected as Democrats have the obligation to support the principles of the Democratic Party.

2. The decisions and votes of a person holding a position of public trust should be a matter of public record.

F. Election and Campaigns

Each state, county and district Democratic Party organization is encouraged to:

1. Conduct candidate campaign workshops which the state central committee will arrange and start in March of every year to instruct candidates on effective campaign procedures and organization; campaigning as Democrats in that organization's jurisdiction'

2. Adopt and publish a code of fair campaign practices to be recommended to all candidates campaigning as Democrats in that organization's jurisdiction;

3. Monitor campaign funding within that organization's jurisdiction;

4. Adopt written guidelines for endorsement of candidates and issues;

5. Take positive, provable steps to ensure that Democratic candidates campaigning within those organizations' jurisdictions endorse Democratic Party objectives as expressed in the platforms of those organizations and in this Charter.

G. Ballot Procedures

1. When individuals vote in public elections, secret ballots shall be used.

2. When a person votes as an elected representative, open ballots shall be used. This provision does not apply to the election by precinct committee officers of organizational officers (e.g. chair, vice-chair, secretary, treasurer, state committeepersons), provided that there is a mechanism to ensure the eligibility of those who cast ballots (e.g. a check-off list, sign-in-sheet, ballot receipts).

3. Proxies may be used in accordance with the National Charter.

Article VIII

General Provisions

A. This Charter is intended to conform to the Charter, By-Laws and Rules of the Democratic Party of the United States. If parts of this Charter are found to be in conflict with the National Charter or other provisions pursuant to the authority of the National Charter, the applicable National provision shall govern. State laws relating to Party operations shall be observed unless in conflict with this Charter or the National Charter or provisions adopted pursuant to the authority of either Charter. In the event of such conflict with state laws, the Democratic Party of the State of Washington shall take provable positive steps to bring such laws into conformity with such Party provisions.

B. The state central committee shall publish and maintain current copies of this Charter and make them available on request.

Article IX

Amendments, Bylaws and Rules

A. Charter Amendments

1. This Charter may be amended by affirmative vote of a majority of all the delegates to the state convention. An amendment must be presented in writing to the state chair by an elected delegated to the state convention at least 30 days before the convention. The state chair shall then publish the full text of the proposed amendment in the call to the state convention or in a mailing sent to all convention delegates no later then ten days prior to the convention.

2. This Charter may also be amended by affirmative vote of two-thirds of the entire membership of the state central committee. An amendment must be proposed in writing by a member of the state central committee and be published in full in the notice of the meeting of the state central committee sent to each member of the committee. An amendment adopted by the state central committee shall be subject to ratification by the next state convention if a written request for ratification is presented in writing to the state chair by an elected delegate to the state convention at least 30 days before the convention.

3. Newly adopted or amended provisions of this Charter shall take effect on the January 1st after they are adopted or ratified by the state convention, except that the adopting resolution may specify that an amendment shall take effect immediately.

B. Bylaws of the Democratic Party of the State of Washington

1. The Democratic Party of the State of Washington shall adopt bylaws to govern its affairs in those matters not fully specified by this Charter. The bylaws should be consistent with and subject to this Charter, the Charter of the Democratic Party of the United States and provisions adopted pursuant to the authority of either Charter.

2. Bylaws may be adopted or amended by affirmative vote of a majority of delegates at the state convention.

3. Bylaws may also be adopted or amended by affirmative vote of a majority of the entire membership of the state central committee.

4. The state central committee shall maintain copies of the current bylaws of the Democratic Party of the State of Washington and shall make them available on request.

C. Rules

1. Each official body of the Democratic Party of the State of Washington shall adopt its own written rules (including bylaws, if applicable) for the conduct of its affairs. These rules shall be consistent with this Charter, the Charter of

the Democratic Party of the United States and provisions adopted pursuant to the authority of either Charter, and the bylaws of the Democratic Party of the State of Washington.

2. Each official body of the Democratic Party of the State of Washington shall maintain copies of its own current rules and make them available on request.

3. The state central committee shall maintain copies of current rules of each official body of the Democratic Party of the State of Washington and make them available upon request.

EXHIBIT B

Passed by the WSDCC Rules Committee on April 2, 2005 for consideration by the WSDCC

Rules for the Selection of Candidates And Nominees for Public Office

I. **Applicability.** These Rules shall apply to the selection of any candidate or nominee for public office who intends to be, or is, associated with the Democratic Party, directly or indirectly, on any ballot used in a publicly financed election or candidate selection process.

II. **Exclusive Means of Selection.** Candidates and nominees for public office must be selected by one of the means specified in these Rules.

III. **Democratic Primary.** Where State law provides for a public primary that complies with these Rules (hereinafter a "Democratic Primary"), candidates and nominees shall be selected by means of that Democratic Primary; provided that in the event of a vacancy on the Democratic ticket, the State Chair may fill the vacancy as specified in State law and applicable Party rules.

IV. **Rules governing Democratic primaries.** A public primary must comply with the following rules in order to qualify as a Democratic Primary where candidates or nominees will be selected by means of the primary:

A. **Separate Democratic ballot required.** All Democratic Primaries occurring on a single date shall appear on the same ballot. The ballot provided to voters in the Democratic Primary may not contain the

names of any candidate for office who is affiliated with any other political party, or of no political party, except that the State may provide to voters a ballot that may be simultaneously used in the Democratic Primaries and in primaries for offices in which no candidate's name is associated with any political party or persuasion, and in such case the ballot may contain the names of all candidates for such offices.

B. **Opportunity to join or confirm membership in the Party must be provided.** Voters participating in the Democratic Primary must be offered the opportunity to publicly affiliate with the Democratic Party but public affiliation with the Party shall not be a requirement of participation in the Democratic Primary unless such public affiliation is required by law.

C. **Affiliates of other political parties forbidden to participate.** As a condition of participating in the Democratic Primary, voters must either publicly affiliate with the Democratic Party or publicly indicate that they are not affiliated with any political party.

D. **Voter participation is public record.** The participation of any voter in the Democratic Primary shall be a public record to the extent necessary to verify that only voters eligible under party rules receive a Democratic ballot and, in addition, the choice

by any voter whether to voluntarily affiliate with the Democratic Party at the Democratic Primary or to declare a lack of affiliation with any political party shall be a public record.

E. **List of Democratic affiliates provided to Party.** The law governing the conduct of the Democratic Primary must provide that election officials shall provide to the Democratic Party no later than the date of certification of the results of the Democratic Primary, a list containing the name of every voter participated in the primary and who voluntarily chose to publicly affiliate with the Democratic Party.

F. A statewide system of voluntary voter registration by party which allows voters to publicly affiliate with the Democratic Party shall satisfy the requirements of subparagraphs B and E, of this paragraph.

V. **Alternative means of selection.** Where State law does not provide for a Democratic Primary that complies with these Rules, candidates and nominees shall be selected in accordance with the following rules, provided that in the event of a vacancy on the Democratic ticket, the State chair may fill the vacancy as provided by State law and other applicable Party rules; and further provided that in 2005 implementation of this Alternative Means of Selection must be affirmatively approved by the Executive Board. The Central Committee specifically intends that the Executive Board may consider issues

including but not limited to litigation, citizen initiatives, and the current state of the law in reaching its decision on implementation.

A. **Authorization required.** No candidate for public office may campaign as a Democratic candidate except as authorized pursuant to this Rule. No candidate for public office may be designated, nor permit him or herself to be designated, as the Democratic nominee for any public office unless such candidate has been designated by the Washington State Democratic Party as a Democratic nominee pursuant to this Rule.

B. In the event a primary process is suspended by a qualifying referendum or otherwise is inconsistent with these rules, and upon an affirmative vote of the Executive Board, party candidates shall be selected by the following process.

1. County Partisan Office Nominees. The nominees for county partisan office shall be chosen at a county nominating convention, or optionally at county council district nominating conventions, consisting of elected and appointed precinct committee officers representing precincts in that county or council district as of the last central committee meeting or executive board meeting held prior to the county nominating convention. Such nominating conventions or caucuses shall be called by the Chair of the Washington State

Democratic Party not later than 14 days prior to the date filing for office commences. The results from each nominating convention shall be reported to the Chair of the Washington State Democratic Party within 24 hours after the convention has adjourned.

2. Legislative Nominees. The nominees for Washington State Senate and Washington State House of Representatives shall be chosen at a legislative district nominating convention consisting of elected and appointed precinct committee officers representing precincts in that legislative district as of the last legislative district meeting held prior to the legislative district nominating convention. Such nominating conventions shall be called by the Chair of the Washington State Democratic Party not later than 14 days prior to the date filing for office commences. The results from each nominating convention shall be reported to the Chair of the Washington State Democratic Party within 24 hours after the convention has adjourned.

3. Congressional Nominees. The nominees for United States Congress shall be chosen through nominating conventions of elected and appointed precinct committee officers representing precincts in that Congressional District

as of the last legislative district meeting or county central committee meeting held prior to the Congressional District nominating convention. Such nominating conventions shall be called by the Chair of the Washington State Democratic Party not later than 14 days prior to the date filing for office commences. The results from each nominating convention shall be reported to the Chair of the Washington State Democratic Party within 24 hours after the convention has adjourned.

4. Statewide Nominees. The nominees for all statewide partisan elected offices (US Senator, Governor, Lt. Governor, Secretary of State, Treasurer, Auditor, Attorney General, Insurance Commissioner, and Public Lands Commissioner) shall be selected at the Democratic State Convention. Such nominating conventions shall be called by the Chair of the Washington State Democratic Party not later than 14 days prior to the date filing for office commences. The results from each nominating convention shall be reported to the Chair of the Washington State Democratic Party within 24 hours after the convention has adjourned.

5. The procedures set forth in subparagraphs 3 and 4 may be delegated in whole or in part by a vote of those entitled to vote to the

Washington State Democratic Central Committee.

6. Rules for Balloting. Each candidate or the candidate's representative shall be entitled to address the convention for not less than two minutes, or longer if provided for under rules adopted to govern the convention. Each delegate shall vote by ballot for no more than one candidate for each office for which nominations are sought. The results shall be tallied and reported to the chairman of the convention. The convention may dispense with balloting and nominate by acclamation for any office in which a single candidate is seeking nomination.

C. Vacancy on ticket. A vacancy caused by the death or disqualification of nominee of the Democratic Party may be filled at any time up to and including the day prior to the election for that position. For state partisan offices in any political subdivision voted on solely by electors of a single county, an individual shall be appointed to fill such vacancy by the relevant Democratic County Central Committee. For all other partisan offices, including federal or statewide offices, an individual shall be appointed to fill such vacancy by the Washington State Democratic Central Committee. The authority granted under this section may be delegated by the County or State Democratic Central Committee to its Executive Board or Chair.

1. Weighted Voting. The number of votes at each nominating convention other than the state convention shall be equal to the sum of the number of precinct level delegates that were allocated to the precincts that are represented at the convention during the most recent National Delegate Selection process. Each elected or appointed PCO voting at the caucus or convention shall be apportioned the number of votes equal to the number of precinct level delegates his or her precinct was allotted during the most recent National Delegate Selection process. In the case of newly formulated precincts the calculation would be based on the allocation formula used in the most recent delegate selection plan.

2. Majority Vote Required. The candidate of the Democratic Party shall be the candidate who receives a majority vote of weighted ballots. If no candidate receives a majority of the first ballot, the candidate receiving the least number of votes shall be dropped from each successive ballot until a candidate receives a majority. In the event of a tie in determining which candidate shall be dropped, the candidate shall be chosen by lot.

3. Nominations in Cases Where No Convention Action Occurs. In any case where the appropriate convention has

failed to designate a nominee, the nominee will be designated by Democratic State Central Committee acting through its Chair.

4. These rules are mandatory and are not amendable by any party organization other than the Washington State Democratic Central Committee or the State Convention.

5. State Chair to Notify Election of Officials. To the extent required by law or appropriate, the State Chair shall submit to state and local election officials the names of those candidates authorized to campaign as Democratic candidates and those candidates designated as Democratic nominees.

VI. **Threshold demonstration of Party support required.** Any registered voter in the State of Washington is eligible for selection as a candidate or nominee of the Democratic Party for any public office provided:

A. The voter must publicly attest his or her support of the Democratic Party and his or her desire to be publicly known as a Democrat; and

B. The voter must be otherwise eligible under state law for election to the office sought; and

C. The voter must not have been registered as a member of any political party other than the Democratic Party for at least one (1) year immediately preceding filing for office; and

D. Beginning January 1, 2005 the voter must have either (1) received a vote of approval of 25% of those present and voting at a meeting of the Democratic Party organization under the charter for the jurisdiction represented by the office sought or (2) at the time of filing the declaration of candidacy required by law submitted a nominating petition signed by at least 5% of those voters who at the time of signing are voters in the jurisdiction and registered with the Democratic Party or (3) at the time of filing the declaration of candidacy required by law submitted a nominating petition signed by at least 25% of the elected and appointed Democratic Precinct Committee Officers representing precincts within the jurisdiction represented by the office sought and who held such office as of the last meeting of the Democratic party organization for the jurisdiction.

VII. **Decision of Executive Board Final.** The decision of the executive board with respect to any question of interpretation of these rules is final.

VIII. All nominating conventions held under this rule shall submit their results to the state party no later than July 12, 2005.

THE HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, v. DEAN LOGAN, et al., Defendants, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Interveners, LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Interveners, STATE OF WASHINGTON, et al., Interveners, WASHINGTON STATE GRANGE, et al., Interveners.	Case No: CV05-0927-TSZ LIBERTARIAN PARTY'S MOTION FOR SUMMARY JUDGMENT NOTE FOR MOTION CALENDAR WEDNESDAY, JULY 13, 2005 AT 9:00 AM ORAL ARGUMENT REQUESTED

SUMMARY OF MOTION

The Libertarian Party of Washington State ("the LP") seeks an order of Summary Judgment declaring Initiative 872, passed by Washington voters in 2004, is unconstitutional on its face, and an

injunction preventing the several government defendants from implementing the initiative. The LP also requests an order preventing the defendants from identifying on any primary ballot a "Libertarian" candidate who has not been authorized to carry the Libertarian label under the rules of the LP. The LP reserves to a later date its claim that the initiative is unconstitutional as applied to the LP and its adherents.

In this motion the LP will show the primary system established under Initiative 872 violates basic First Amendment principles, primarily because I-872 allows candidates to use party labels to inform voters of their ideology while denying the political party the ability to define what the party label means. In addition, I-872 places impermissible limits on access to the general election ballot contrary to the Article 1 and the Fourteenth Amendment of the U.S. Constitution. Accordingly, it is unconstitutional on its face.

STATEMENT OF FACTS

On September 13, 2003, the Ninth Circuit Court of Appeals declared Washington's 68 year old "blanket primary[1]" unconstitutional as a violation of the political parties' First Amendment rights. *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (C.A.9 2003). On January 8, 2004, Intervenor-Defendant Washington State Grange filed Initiative 872 with the Secretary of State for

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[1] The so-called "blanket primary" was adopted by the state legislature in 1935, pursuant to an earlier initiative of Intevenor-Defendant Washington State Grange.

Washington,[2] which initiative proposed a so-called "modified blanket primary"[3] system similar to but nonetheless unlike one used in the State of Louisiana,[4] and which was expressly intended to "look nearly identical to the blanket primary system."[5]

According to Section 2 of the initiative, the stated legislative intent was to:

> Protect each voter's right to vote for any candidate for any office...[by] "allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election: and giving each voter a free choice among all candidates in the primary." Heavey v. Chapman, 93 Wn.2d 700, 705, 611 P.2d 1256 (1980)...In the event of a final court

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[2] See, http://www.secstate.wa.gov/elections/initiatives/signatures.aspx?y=2004.

[3] The primary system introduced by I-872 has alternately been called the "modified blanket primary," the "qualifying" primary," the "Cajun" primary or the "top two" primary.

[4] The main distinction between the "modified blanket primary" introduced by I-872 and the Louisiana system is that Washington has a primary in September followed a general election in November, while Louisiana has a general election in November followed by a run-off in December. This distinction has constitutional significance, as will be explained in Part 5 of this memorandum.

[5] See, Exhibit 2, page 1, Declaration of John J. White Jr. in Support of Plaintiff's Motion for Preliminary Injunction, Clerk's Document # 8 (CD 8).

> judgment invalidating the blanket primary, this People's Choice Initiative will become effective to implement a system that best protects the rights of voters to make such choices, increases voter participation, and advances compelling interests of the state of Washington.

Initiative 872, § 2.

Section 18 of the initiative specifically provided:

> This act takes effect only if the Ninth Circuit Court of Appeals' decision in Democratic Party of Washington State v. Reed, 343 F.3d 1198 (9th Cir. 2003) holding the blanket primary election system in Washington state invalid becomes final and a Final Judgment is entered to that effect.

Initiative 872, § 18.

On Feb. 23, 2004, the United States Supreme Court denied the state's petition for review of the Ninth Circuit Decision. *Reed v. Democratic Party of Washington*, 540 U.S. 1213 (2004).

Later the Washington State Legislature passed, and on April 1, 2004 Governor Locke approved, an open primary system (commonly known as the "Montana" primary system) wherein voters first selected a party ballot and then voted for

candidates on the selected party ballot.[6] Engrossed Senate Bill 6453, Chapter 271, Laws of 2004, included provisions for both a "modified blanket" primary system similar to I-872 and a "Montana" or "open" primary system. The former primary system was described in the bill as a "qualifying" primary, while the latter system was described as a "nominating" primary. Recognizing that substantial doubt existed regarding the constitutionality of the "qualifying" primary system, Section 101 of the bill provided:

> If a court of competent jurisdiction holds that a candidate may not identify a major or minor political party as best approximating his or her political philosophy, as provided in RCW 29A.24.030(3), and all appeals of that court order have been exhausted or waived, the secretary of state shall notify the governor, the majority and minority leaders of the two largest caucuses in the senate and the house of representatives, the code reviser, and all county auditors that the state can no longer conduct a qualifying primary and instead will conduct a nominating primary.

However, the governor vetoed the "qualifying" primary portions of the bill, leaving only the

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[6] See, Declaration of Richard Shepard in Support of Summary Judgment, ¶ 2, and Exhibit A thereto.

"nominating" primary system in place.[7] The Washington State Supreme Court upheld the governor's veto against a constitutional challenge by Intervenor-Defendants Washington State Grange on January 20, 2005. *Washington State Grange v. Locke*, 153 Wash.2d 475, 105 P.3d 9 (2005).

On November 2, 2004, voters approved I-872.[8] In addition to the Sections identified above, Section 3 declared that Washington voters had the rights, inter alia, to "cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate."

Section 4 of the initiative re-defined "partisan office" as

> "a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name."

Section 5 of the initiative amended R.C.W. § 29A.04.127 to re-define "primary" or "primary election" as:

> a procedure for winnowing candidates for public office to a final list of two as part of a special or general election. Each voter has the right to cast a vote

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[7] See, veto message, Dec. of Richard Shepard, Exhibit A, at pages 63-66.

[8] See, http://vote.wa.gov/general/measures.aspx?a=872.

> for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.

Section 6 amended RCW 29A.36.170, to limit access to the general election ballot:

> For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot;...

Section 7(3) of the initiative provided:

> For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots by appropriate abbreviation as set forth in rules of the secretary of state. A candidate may express no party or independent preference. Any party or independent preferences are shown for the information of voters only and may in no way limit the options available to voters.

Section 11 of the initiative stated:

> The voters' pamphlet must also contain the political party preference or independent status where a candidate appearing on the ballot has expressed such a preference on his or her declaration of candidacy.

Section 17 of the initiative purported to repeal several statutes regarding elections but failed to repeal R.C.W. §§29A.20.110 through 29A.20.201, all relating to minor party nominating conventions.

Thus the stage was set for additional litigation over the right of all political parties to select their own standard bearers as well as the right of the LP to access the general election ballot.

ARGUMENT

STANDARD OF PROOF

A party is entitled to judgment prior to trial if the pleadings and evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

STIPULATED ISSUES FOR ARGUMENT

1. Does the primary system established by Initiative 872 nominate political party candidates for public office?

Short Answer: Yes.

> "The nature of the nominating procedure determines the nature of the party; he who can make the nomination is owner of the party."[9]

"Nominate" according to Black's Law Dictionary (5th Ed.), means: "To name, designate by name, appoint or propose for election or appointment." Initiative 872 does nothing other than "name, designate by name, appoint or propose for

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[9] E.E. Schattschneider, *Party Government* 64 (1942).

election or appointment," candidates for partisan public office. Neither does I-872 implement a "*nonpartisan* blanket primary" discussed in *California Democratic Party v. Jones*, 530 U.S. 567, 585, 120 S.Ct. 2402 (U.S.Cal.,2000). See, e.g., I-872, § 4. The significant dispute appears to be who does the nominating.

Even if the persons thus nominated under I-872 are not "political party candidates," "that is the problem with the system, not a defense of it." *Reed*, 343 F.3d at 1204. In *Reed* the State argued, because it has no voter registration regime and

> "because of its non-partisan registration, the winners of the primary 'are the 'nominees' not of the parties but of the electorate.' Thus, the State argues, its primary is a '*nonpartisan* blanket primary' that under *Jones* does not violate the parties' associational rights."

Reed, 343 F.3d at 1203 (emphasis in original, footnotes omitted).

The Ninth Circuit dismissed the State's argument:

> "These are distinctions without a difference. That the voters do not reveal their party preferences at a government registration desk does not mean that they do not have them. The Washington scheme denies party adherents the opportunity to nominate their party's candidate free of the risk of

> being swamped by voters whose preference is for the other party."
>
> "Also, those who actively participate in partisan activities, including activities such as holding precinct caucuses in their homes, serving on local and state party committees, contributing money to their parties, canvassing, and watching polls for their parties, have a First Amendment right to further their party's program for what they see as good governance. Their right to freely associate for this purpose is thwarted because the Washington statutory scheme prevents those voters who share their affiliation from selecting their party's nominees."

Reed, 343 F.3d at 1203-1204.

Thus, not only did the Ninth Circuit reject the State's argument that the electorate "nominated" candidates without consideration of political affiliations, it embraced the proposition that the First Amendment rights of political party adherents reached well beyond the context of picnics to include the context of primaries.

Section 7(3) of I-872 expressly provides for candidates to indicate a political party "preference" when filing a declaration of candidacy and will be shown on ballots "for the information of voters." Section 11 expressly provides that the candidate's party "preference" will be included in the state voter's pamphlet.

The defendants here have not demonstrated and cannot demonstrate any constitutionally significant difference between the party "designation"[10] made by candidates in the blanket primary and invalidated by *Reed* and a party "preference" in what they have themselves called the "modified blanket primary." The claimed "right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate," stated in both § 3 & 5 of the initiative, if it is a right at all, is "overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." *Jones, supra,* 530 U.S. at 583. The "rights" claimed in Sections 3 & 5 of I-872 are precisely what the Ninth Circuit held to be a clear violation of the rights of the political parties and their adherents.

> The right of people adhering to a political party to freely associate is not limited to getting together for cocktails and canapes. Party adherents are entitled to associate to choose their party's nominees for public office.

Reed, 343 F.3d at 1204

Not only does I-872 infringe on political party rights, it fosters chaotic and disorderly elections, to the detriment of both political parties and voters.

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[10] See, R.C.W. § 29.15.010(3) Declaration and affidavit of candidacy. Recodified as RCW 29A.24.030 pursuant to 2003 c 111 § 2401, effective July 1, 2004. The full text of now superceded R.C.W. § 29.15.010 is at Declaration of Richard Shepard, Exhibit B.

The "general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences." *Storer v. Brown*, 415 U.S. 724, 735, 94 S.Ct. 1274 (1974). While "states may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election-and campaign-related disorder...." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364 (1997), the primary system established by Initiative 872 prevents the parties from settling their differences internally and actually encourages party splintering and unrestrained factionalism, see, *Storer* 415 U.S. at 735, ("splintered parties and unrestrained factionalism may do significant damage to the fabric of government"), and see, Federalist # 10 (Madison).

Further, by allowing any person to declare a "preference" for a political party while also depriving the political party any right to approve or otherwise determine whether the candidate actually agrees with or subscribes to the principles of the party the State fosters voter confusion regarding what the party label actually means. This state has claimed, and the Supreme Court has agreed, reduced voter confusion was a compelling state interest that justified limiting minor party and independent candidate's access to the general election ballot, *Munro v. Socialist Worker's Party*, 479 U.S. 189 (1986).

By adopting I-872 the state has abandoned that claim, now allowing all candidates to express a "preference" for both major and minor political parties, without any requirement that the candidate

demonstrate any support within the "preferred" party or even among the general public to have immediate access to the primary ballot. The logical result is a cacophony of undisciplined voices on an overcrowded primary ballot, all of which will confuse voters about the LP's message.

2. **If the primary system under Initiative 872 does not nominate political party candidates for public office, does each political party have the right to select for itself the only candidate who will be associated with it on either a primary or general election ballot?**

Short Answer: Yes. To clarify, the Libertarian Party maintains it has the right to select its own standard bearers for appearance on the general election ballot regardless whether the I-872 primary system "nominates political party candidates."

> "In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views."

Jones, 120 S.Ct. at 2408.

The Supreme Court has "continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution." *Jones,* 120 S.Ct. at 2407, (citing *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989), and *Democratic Party Of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, (1981)) (footnote omitted). In *Tashjian, v. Republican Party Of Connecticut,* 479 U.S. 208 (1986), and again in *Eu, supra,* the Supreme Court said "[A] State may enact laws to 'prevent the disruption of the political parties from without' but not, as in this case, laws 'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'" *Id.*, at 227 (quoting *Tashjian*, at 224).

"Since control over participation in a primary can profoundly influence the content of the compromise emerging from the primary election, a political party's ability to define its boundaries cannot be separated from the party's ability to determine its political ideology."[11] "On several occasions this [Supreme] Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions - thus imparting the party's essential functions - and that political parties may accordingly protect themselves 'from intrusion by those with adverse political principles.'" *La Follette*, 450 U.S. at 122 (1981); (citing to *Ray v. Blair*, 343 U.S. 214, 221–222

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[11] Berdon, J. *The Constitutional Right of the Political Party to Chart its Own Course: Defining Its Membership Without State Interference*, 22 Suffolk U.L.R. 933, 965 (quoting Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L.J. 117, 126 (1984)).

(1952); *Rosario v. Rockefeller*, 410 U.S. 752 (1973); and *Kusper v. Pontikes*, 414 U.S. 51, 59-60 (1973).

Historically (except for the 2002 and 2004 elections) the LP has nominated its candidates by convention as provided by prior state law. In *Reed*, while the State was attempting to explain why the blanket primary system treated minor political party candidates differently from major political party candidates it conceded "[a]llowing multiple filings by minor party candidates would further disburse the strength of small parties and would increase the possibility that if none of them gains one percent of the primary vote, no representative of that party would qualify for the general election ballot." *Brief of Appellee State of Washington*, Democratic Party of Washington v Reed (02-35428), at 47.

It then asserted, "it is virtually certain that an affiliate of each major party will advance to the general election; there is no need to 'help' large parties by allowing them to unite behind a single slate of candidates." *Id.* Implicit in that assumption of virtual certainty is the fact that Democratic and Republican Party candidates show historically strong ballot strength, and emerging political parties such as the LP have significantly lesser strength. A survey of recent statewide elections supports this fact.[12]

However, directly contrary to his argument in *Reed*, on May 18, 2005, the Secretary of State adopted emergency rules allegedly to implement

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[12] See, Declaration of Richard Shepard, at ¶ 4, and Exhibit C.

I-872 that effectively preempted and eliminated existing statutory mechanisms (R.C.W. §§ 29A.20.110 through 29A.20.201) for the LP to exercise its right to nominate its candidates by convention.[13]

First, the Secretary does not have the authority under Washington law to repeal a statute. The legislature may not delegate to the executive authority the power to make law. *Morgan v. Department of Social Sec.*, 14 Wash.2d 156, 175, 127 P.2d 686 (1942). An administrative agency may not, by means of an interpretation or clarifying regulation, actually modify or amend the legislative enactment. *Hansen Baking Co. v. City of Seattle*, 48 Wash.2d 737, 742, 296 P.2d 670 (1956); *Fisher Flouring Mills Co. v. State*, 35 Wash.2d 482, 492, 213 P.2d 938 (1950).

Second, the Secretary is judicially estopped from taking a position inconsistent with the position he took in *Reed*. *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (C.A.9 1996). I-872 does not change the status of minor political parties. They are still small and still at risk of disbursed or diluted ballot strength in connection with unwanted or unapproved candidacies. The fact that I-872 removed the so-called "one-percent rule," see, *Munro v. Socialist Workers Party*, 479 U.S. 189, 107 S.Ct. 533, 93 L.Ed.2d 499, (1986), which rule was referenced the State's argument, if relevant at all, exacerbates the ballot access burden on the Libertarian Party. See, Part 5, infra.

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[13] See, Declaration of Richard Shepard, at ¶ 5, and Exhibit D.

The Libertarian Party has the right to nominate its own candidates to the general election ballot under existing statutes and under the First and Fourteenth Amendment. Under Secretary of State's interpretation of I-872 the State deprives the LP of its First Amendment right of expressive association as well as its Fourteenth Amendment right of due process.

3. If the primary system under Initiative 872 nominates political party candidates for public office, does Initiative 872 violate the First Amendment by compelling a political party to associate with unaffiliated voters and members of other political parties in the selection of its nominees?

Short Answer: Yes.

> "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together."

Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)(citation omitted).

This issue was also settled in *Reed*. There the defendants argued since the Democratic and

Republican Parties had no legal or organizational basis for determining party membership, they could not demonstrate a constitutional burden on their members, meanwhile ignoring that the Libertarian Party had an organizational basis for determining party membership, a "non-aggression" pledge.[14] The *Reed* court disposed of the defendants' argument by observing, "That the voters do not reveal their party preferences at a government registration desk does not mean that they do not have them." *Reed, supra.*

More important, the dispositive issue is not who makes up the membership of the political parties, but whether the State can force the parties to accept the I-872 definition of political party membership, which reduced to its essence is no definition at all. The State argued to the Ninth Circuit in *Reed* that political party membership "plays no role" in its election system. See, generally *Brief of Appellee State of Washington*, Democratic Party of Washington v Reed (02-35428), at 41-44. The Grange argued the only valid definition for party membership is voter registration, which the State (and/or the citizens) have refused to enact for over 80 years. *Brief of Appellee Washington State Grange*, Democratic Party of Washington v Reed (02-35428), at 31.

The core issue in *Reed* was thus apparent. The State had co-opted political party labels and

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[14] See, Declaration of Richard Shepard, ¶ 6, and Exhibit E thereto.

prestige into its primary election system, and at the same time deprived the political parties of the means to identify their members upon a legal basis (voter registration) and prevented them from identifying their members on an organizational basis (party rule). The *Reed* court essentially held the deprivation of both legal and organizational bases for membership was a severe constitutional burden on its face. As each relates to identification of party membership, there is no meaningful distinction between the old blanket primary and the "modified blanket primary," and I-872 is just as unconstitutional on this ground as was the old blanket primary.

4. **Does Washington's filing statute impose forced association of political parties with candidates in violation of the parties' First Amendment associational rights?**

Short Answer: Yes.

> "[A] single election in which the party nominee is selected by nonparty members could be enough to destroy the party. ... Ordinarily, however, being saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it. '[R]egulating the identity of the parties' leaders,' we have said, 'may ... color the

> parties' message and interfere with the parties' decisions as to the best means to promote that message.'"

Jones, at 2410-2411, (citing *Eu*, 489 U. S., at 231, n. 21).

In addition to the burden of depriving the political parties of any meaningful way to define their membership for the purpose of nominating candidates, I-872 also purports to deprive the parties of their right to require candidates to comply with internal party rules in seeking the nomination in the name of the party.

As part of its internal rules the Libertarian Party requires all candidates who wish to represent the Libertarian Party must be members of the Libertarian Party. One becomes a member of the Libertarian Party by subscribing to or affirming a non-aggression pledge.[15] In addition, the name "Libertarian Party" is a registered trademark, and accordingly the LP has a proprietary right to determine who may use the name and for what purposes the name may be used.[16]

Federal courts have consistently held political parties have the right to insist on loyalty to party principles, *Nader v. Schafer*, 417 F.Supp. 837, 847 (D.Conn. 1976), summarily aff'd 429 U.S. 989 (1976), the right to require a loyalty pledge, *Ray v. Blair*,

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[15] See, Declaration of Richard Shepard, ¶ 6, and Exhibit E thereto

[16] See, Declaration of Richard Shepard, ¶ 7, and Exhibit F thereto.

343 U.S. 214, 231 (1952),[17] and the right to impose tests on candidates. *Duke v Smith* 13 F.2d 388, 391 n.3 (11th Cir. 1994). "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring in part and concurring in the judgment).

I-872 deprives the LP of its ability to enforce its requirement that candidates of the party be members of the party as well as its ability to regulate the use of the Libertarian Party name by non-members. Accordingly it forces the LP to associate with candidates who may not agree with, and who in some cases may actively oppose, the principles and message of the LP.

5. Does Initiative 872's limitation of access to the general election ballot to only the top two vote-getters in the primary for partisan office unconstitutionally limit ballot access for minor political parties?

Short Answer: Yes

> "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the

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[17] *Reed* sets forth the basic constitutional rationale for the Libertarian Party's right to require its candidates to execute its "non-aggression" pledge, but *Blair* is directly on point and dispositive.

> right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."

Williams v. Rhodes, 393 U.S. 23, 31, 89 S.Ct. 5 (1968).

Under I-872, instead of having a relatively modest and easily calculable threshold for access to the general election ballot, such as the so-called "one-percent rule," see, *Munro, supra*, Libertarian Party candidates now face a ballot access threshold that is a moving target, which target is dependant on factors wholly outside the control of the Libertarian Party.

In a three candidate race for a partisan office the Libertarian Party candidate could need to garner more than 33% of the vote to advance to the general election. In a multiple candidate race the corresponding vote requirement would vary significantly, depending on the level of support for other candidates, the political and statistical variables increasing exponentially with the addition of each new candidate. From a historical point of view the second place candidate in a statewide primary in Washington has typically obtained between 21% and 41% of the total vote. Third place candidates, often Democratic or Republican Party candidates, typically range between 4% and 21% of the total vote.[18] Without reasonable certainty under a "top two go forward" scheme how many candidates

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[18] See, Declaration of Richard Shepard, ¶ 4, and Exhibit C thereto.

will declare their candidacy or what portion of the vote a candidate must win to reach the general election ballot, the incentive for the Libertarian Party to place anyone on the ballot is dramatically reduced.

The void-for-vagueness doctrine is applicable to laws regulating conduct protected by the First Amendment. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). "[A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law." *Baggett v. Bullitt*, 377 U.S. 360, 367, 84 S.Ct. 1316 (1964)(citations omitted). A statute is unconstitutionally vague if it does not give "a person of ordinary intelligence fair notice" of the statute's requirements. *United States v Harriss*, 347 U.S. 612, 617 (1954).

> As we said in *Smith v. People of State of California*, '* * * stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.' 361 U.S. 147, at 151, 80 S.Ct. 215, 217, 4 L.Ed.2d 205. 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of

> the Republic, is a fundamental principle of our constitutional system.

Cramp v. Board of Public Instruction of Orange County, Fla., 368 U.S. 278, 287-288, 82 S.Ct. 275 (1961)

A vague statute is not reasonably necessary to achieve a State's interest in regulating ballot access. *Duke v. Connell*, 790 F. Supp. 50, 53-54 (DRI 1992). "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike,..." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

The Libertarian Party is a "small" party without the "strength" of the older parties, so there is no "certainty" how many, if any, of its candidates (and hence its First Amendment protected message) will reach the general election ballot. By presenting the LP with a moving target for access to the general election ballot, I-872 is unconstitutionally vague.

In addition to the "moving target" ballot access problem, I-872 also imposes an impermissible numerical barrier upon the Libertarian Party for access to the general election ballot. For the offices of U.S. Senator and Governor, for example, no other state in the nation but Washington requires voter support of more than 2.05% of the electorate for access to the general election ballot.[19] As can be seen from the historical survey, in order to move to the general election ballot in a top-two system a third party candidate is going to have to beat Democratic

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[19] See, Declaration of Richard Shepard, at ¶ 8, and Exhibit G thereto.

and Republican Party candidates who nearly always obtain 21% or more of the total vote.

The United States Constitution, Art. I, § 4, cl. 1, authorizes Congress to pre-empt state law regarding the time, place and manner of elections. Under that power Congress determined that Representatives, Senators and Presidential electors should all be elected on the second Tuesday of the November in each affected year, 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1, provided, in the event no candidate obtains a majority or other "failure to elect" a state may hold a runoff. 2 U.S.C.A. § 8; *Foster v. Love*, 522 U.S. 67, 71-72, 118 S.Ct. 464, n. 3 (1997).

Aside from thus authorizing runoffs, Congress has not directly legislated "time, place and manner" regulations that purport to "winnow" the field of candidates who may appear on the general election ballot. However,

> "For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. The right derives from the First and Fourteenth Amendments and advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences. See *Anderson v. Celebrezze*, 460 U.S. 780, 793-794, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 59 L. Ed. 2d 230, 99 S.

> Ct. 983 (1979); *Williams v. Rhodes*, 393 U.S. 23, 30-31, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968). To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, see *Anderson*, supra, at 789, and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance. See *Socialist Workers Party*, supra, at 184, 186."

Norman v Reed, 502 U.S. 279 288-289 (U.S., 1992)

Despite this rich history of ballot access litigation Congress has not seen fit to disturb the general election ballot access jurisprudence of the Supreme Court. While the right of a minor party or independent candidate to access to the general election ballot is not absolute, e.g., *Munro, supra*, none of the ballot access cases suggests that a candidate showing a "modicum of support," *Jenness*, 403 U.S. at 442, may be excluded from the general election ballot.

In *Rhodes, supra,* the court invalidated an Ohio signature requirement of 15% of the electorate for minor party ballot access. *Jenness* approved a Georgia requirement that a candidate must file a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question, and intimated that

a requirement substantially higher than 5% would be constitutionally suspect. 415 U.S., at 739, n 10.

In a later case the Supreme Court summarily affirmed a judgment of the eastern district of Arkansas that invalidated a 10% signature requirement. *Jernigan v. Lendall*, 433 U.S. 901, 97 S.Ct. 2963 (1977). While *Lendell* was a summary decision, Justice Stewart, who wrote the majority opinion in *Jenness*, voted to affirm because the 10% requirement, coupled with an early filing deadline, was "unreasonably burdensome" upon Mr. Lendell.[20] Lest the defendants argue that signature requirements for ballot access are qualitatively different from primary vote percentages, the *Munro* court was "unpersuaded, ..., that the differences between the two mechanisms are of constitutional dimension" 479 U.S. at 197.

States do not have the power to adopt their own qualifications for congressional service and the power to add qualifications for the offices of congressman and senator is not part of the original powers of sovereignty which the Tenth Amendment reserved to the states. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842 (1995). I-872 enacted an election system that imposes unconstitutional numerical qualifications on federal candidates by limiting the number of general election candidates to two and by requiring candidates to show more than a "modicum of support" to appear on the general election ballot.

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[20] See, Declaration of Richard Shepard, ¶ 9, and Exhibit H thereto.

CONCLUSION

For the foregoing reasons, this court should declare I-872 unconstitutional in its entirety, that the state has demonstrated on interest sufficiently weighty or narrowly tailored to justify the burden on the Libertarian Party, all in violation of 42 U.S.C. § 1983 et seq., and enter an order prohibiting the government defendants from implementing it.

DATED Friday, June 17, 2005, at Tacoma, Washington.

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(19)

Supreme Court, U.S.
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NOS. 06-730, 06-713

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE GRANGE,

Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY, ET AL.,

Respondents.

STATE OF WASHINGTON; ROB MCKENNA, ATTORNEY GENERAL; SAM REED, SECRETARY OF STATE,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX VOLUME II OF III

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition For Certiorari of the Washington State Grange, Docket No. 06-710:

Washington State Republican Party v. Washington,
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Washington State Republican Party v. Washington,
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Washington State Republican Party v. Logan
377 F. Supp. 2d 907 (W.D. Wash. 2005) 35a

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RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(No. 05-35774) (Appeal of Washington State Grange)

(No. 05-35780) (Appeal of State of Washington)

(NOTE: The dockets for these two appeals are identical except where noted below)

August 4, 2005 Docketed Cause and Entered Appearances of Counsel

August 4, 2005 Civil Appeals Docketing Statement

August 5, 2005 Case rejected from Circuit Mediation Program

August 9, 2005 Appellant's Notice of Designation of Reporter's Transcript

August 11, 2005 Appellees' Response to Motion to Expedite Review (No. 05-35774 only)

August 11, 2005 Appellants' Notice of Designation of Reporter's Transcript (entire transcript ordered)

August 12, 2005 Appellee State Republican Party's Joinder of Opposition to Motion to Expedite Review (No. 05-35774 only)

August 17, 2005 Appellant Washington State Grange's Reply to Response Supporting Motion to Expedite Appeal (No. 05-35774 only)

August 17, 2005 Appellees' Response Opposing Motion to Expedite Review (No. 05-35774 only)

August 18, 2005 Appellants' Joint Reply Supporting Motion to Expedite Review

August 19, 2005 Order Granting in Part and Denying in Part Motion to Expedite Review

August 25, 2005 Appellee Democratic Central Committee's Motion to Extend Time to File Brief

August 31, 2005 Order Granting Democratic Central Committee's Motion to Extend Time

September 19, 2005 Appellant Washington State Grange Opening Brief filed (No. 05-35774)

September 19, 2005 Appellant State of Washington's Opening Brief filed (No. 05-37580)

October 18, 2005 Appellee Washington State Republican Party Brief filed (No. 05-37580)

October 19, 2005 Appellee Washington State Republican Party Brief filed (No. 05-37574)

October 19, 2005 Appellee Libertarian Party of Washington Brief filed

October 26, 2005 Appellee State Democratic Central Committee Brief filed

October 26, 2005 Amicus FairVote's Motion and Brief filed

October 31, 2005 Appellant Washington State Grange's Response Opposing FairVote's Motion for Amicus Status (No. 05-37574)

October 31, 2005 Appellant State of Washington's Response Opposing FairVote's Motion for Amicus Status

October 31, 2005 Appellee Washington State Republican Party's Response Opposing FairVote's Motion for Amicus Status

November 1, 2005 Appellee Washington State Democratic Committee's Joinder in Appellee Republican Party's Response Opposing FairVote's Motion for Amicus Status

November 7, 2005 FairVote's Reply to Responses

November 8, 2005 Order Consolidating Appeals of Washington State Grange and State of Washington, Granting Appellee Washington State Democratic Party's Motion for Extension of Time, and Referring FairVote's Motion to the Merits Panel

November 8, 2005 Appellee Washington State Democratic Committee's Brief

November 8, 2005 Appellant Washington State Grange's Reply Brief

November 8, 2005 Appellant State of Washington's Reply Brief

December 21, 2005 Argument Calendared for Feb. 6. 2006

January 10, 2006 FairVote's Additional Brief

February 6, 2006 Argued and Submitted to Dorothy W. NELSON, Pamela A. RYMER, and Raymond C. FISHER

August 22, 2006 Order Granting Leave to FairVote to File Amicus Brief

August 22, 2006 Order on Merits Affirming U. S. District Court

September 13, 2006 Mandate Issued and Costs Taxed

October 3, 2006 Agreed Order on Attorneys' Fees

November 27, 2006 Notice from Supreme Court: Washington State Grange Petition for Certiorari Filed on 11/20/06

December 1, 2006 Notice from Supreme Court: State of Washington Petition for Certiorari Filed on 11/20/06

March 1, 2007 Notice from Supreme Court: Petitions for Certiorari Granted on 2/26/07

UNITED DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

(No. 2:05-cv-00927-TSZ)

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May 19, 2005 Motion to Intervene by Intervenor Plaintiffs Washington State Democratic Central Committee [Doc. #2]

May 19, 2005 Motion to Intervene by Intervenor Plaintiffs Libertarian Party of Washington State [Doc. #3]

May 26, 2005 Motion for Preliminary Injunction by Plaintiff Washington State Republican Party [Doc. #7]

May 26, 2005 Declaration of John J. White, Jr. re Motion for Preliminary Injunction [Doc. #8]

May 27, 2005 Minute Order by Judge Thomas S. Zilly scheduling status conference [Doc #11]

June 2, 2005 Motion to Intervene of State of Washington, Rob McKenna, and Sam Reed [Doc. #22]

June 2, 2005 Answer of State of Washington Intervenor Defendants [Doc. #23]

June 7, 2005 Complaint of Intervenor Plaintiff Libertarian Party of Washington State [Doc. #28]

June 7, 2005 Order Granting Motion to Intervene of Democratic Central Committee [Doc. #29]

June 7, 2005 Order Granting Motion to Intervene of State of Washington et al. [Doc. #30]

June 7, 2005 Minute Entry re: Status Conference held on 6/7/05; Granting Motions to Intervene by State of Washington, Democratic Central Committee, Libertarian Party, and Washington State Grange; Adopting Briefing Schedule; Requesting Joint Statement of Issues; Continuing Motion for Preliminary Injunction [Doc. #45]

June 8, 2005 Order Granting Motion to Intervene of Libertarian Party [Doc. #27]

June 8, 2005 Complaint of Intervenor Plaintiff Democratic Central Committee [Doc. #31]

June 8, 2005 Request of Washington State Grange for Entry of Order Granting Intervention [Doc. #33]

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June 23, 2005 Supplement re Motion for Summary Judgment of Washington State Republican Party [Doc. #63]

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July 1, 2005 Response by Intervenor Defendant State of Washington to Motions for Summary Judgment [Doc. #65]

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July 1, 2005 Stipulation and Agreed Order of Substitution and Dismissal [Doc. #67]

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July 1, 2005 Exhibits A-V to Declaration by Washington State Grange in Response to Motions for Summary Judgment [Doc. #69]

July 1, 2005 Response by Intervenor Defendant Washington State Grange to Motions for Summary Judgment [Doc. #70]

July 5, 2005 Errata and Replacement Brief by Washington State Grange [Doc. #72]

July 5, 2005 Supplement to Exhibit G to Declaration of Rod Dembowski by Washington State Grange [Doc. #73]

July 6, 2005 Reply of Intervenor Plaintiff Washington State Democratic Central Committee [Doc. #75]

July 6, 2005 Second Declaration of David T. McDonald filed by Washington State Democratic Committee [Doc. #76]

July 6, 2005 Response by Plaintiff Washington State Republican Party [Doc. #77]

July 6, 2005 Reply of Intervenor Plaintiff Libertarian Party of Washington [Doc. #78]

July 6, 2005 Declaration of Richard Winger filed by Libertarian Party of Washington [Doc. #79]

July 6, 2005 Reply of Plaintiff Washington State Republican Party [Doc. #81]

July 6, 2005 Supplemental Declaration of Kevin B. Hansen filed by Washington State Republican Party [Doc. #82]

July 8, 2005 Answer of Intervenor Defendant State of Washington to Complaint of Libertarian Party of Washington State [Doc. #83]

July 8, 2005 Answer of Intervenor Defendant State of Washington to Complaint of Washington State Democratic Central Committee [Doc. #84]

July 13, 2005 Minute Entry: Oral Argument Held; Court signs stipulation and agree order of substitution and dismissal; hears argument and takes matter under advisement [Doc. #85]

July 13, 2005 Stipulation and Order of Substitution and Dismissal [Doc. #86]

July 15, 2005 Order and Preliminary Injunction by Judge Thomas S. Zilly [Doc. #87]

July 22, 2005 Praecipe to Attach Proposed Order Granting Permanent Injunction [Doc. #88]

July 27, 2005 Objections by State of Washington re Praecipe to Attach Proposed Order [Doc. #90]

July 27, 2005 Objections by Washington State Grange re Praecipe to Attach Proposed Order [Doc. #91]

July 28, 2005 Minute Order by Judge Thomas S. Zilly re Plaintiffs' request to respond to Defendants' Objections [Doc. #92]

July 29, 2005 Response of Washington State Republican Party [Doc. #93]

July 29, 2005 Permanent Injunction by Judge Thomas S. Zilly [Doc. #94]

July 29, 2005 Notice of Appeal of Washington State Grange [Doc. #95]

July 29, 2005 Civil Appeals Docketing Statement by Washington State Grange [Doc. #96]

July 29, 2005 Notice of Appeal of State of Washington [Doc. #97]

July 29, 2005 Civil Appeals Docketing Statement by State of Washington [Doc. #98]

August 1, 2005 Transcript of Proceedings filed for 7/13/05 Hearing [Doc. #101]

August 3, 2005 Appeal Notification Packet sent to US Court of Appeals re Washington State Grange Appeal [Doc. #99]

August 4, 2005 Appeal Notification Packet sent to US Court of Appeals re State of Washington Appeal [Doc. #100]

August 5, 2005 (Proposed) Time Schedule Order filed by Washington State Grange [Doc. #101]

August 5, 2005 (Proposed) Time Schedule Order filed by State of Washington [Doc. #102]

August 8, 2005 Notice by Washington State Grange Ordering Entire Transcript [Doc. #104]

August 8, 2005 Letter by John J. White Requesting Status Conference {Doc. #105]

August 10, 2005 Motion for Attorney Fees by Libertarian Party [Doc. #106]

August 12, 2005 Order by Judge Thomas S. Zilly [Doc. #107]

August 22, 2005 Order by US Court of Appeals re Briefing Schedule [Doc. #108]

September 2, 2005 Order by US Court of Appeals Amending Briefing Schedule [Doc. #109]

January 4, 2006 Clerk's Record on Appeal transmitted to US Court of Appeals

April 27, 2006 Agreed Motion to Substitute Parties filed by Washington State Republican Party [Doc. #110]

May 4, 2006 Order Granting Motion to Substitute Parties [Doc. #111]

September 18, 2006 Mandate of US Court of Appeals filed [Doc. #112]

September 18, 2006 Costs Taxed Against State of Washington [Doc. #113]

October 6, 2006 Order of USCA Amending Mandate to Reflect Amended Attorney Fees [Doc. #114]

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, v. DEAN LOGAN, et al., Defendants, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Interveners LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Interveners STATE OF WASHINGTON, et al., Interveners WASHINGTON STATE GRANGE, et al., Interveners.	Case No: CV05-0927-TSZ DECLARATION OF RICHARD SHEPARD IN SUPPORT OF LIBERTARIAN PARTY'S MOTION FOR SUMMARY JUDGMENT NOTE ON MOTION CALENDAR FRIDAY, JULY 13, 2005 ORAL ARGUMENT REQUESTED

RICHARD S. SHEPARD declares under penalty of perjury under the laws of the State of Washington and the United States of America as follows:

1. I am the attorney for the Libertarian Plaintiff-Intervenors in this lawsuit, am competent to testify, and make this declaration of my own personal knowledge.

2. Attached hereto as Exhibit A is a true and correct copy of Engrossed Senate Bill 6453 adopting an open "nominating" primary in Washington and containing the Governor's message explaining his veto of the companion top-two "qualifying" primary.
3. Attached hereto as Exhibit B is a true and correct copy of RCW 29.15.010, effective at the time *Democratic Party of Washington v. Reed* was being litigated, and recodified as RCW 29A.24.030 effective 2004. Subsection (3) authorizes any moving party candidate to "designate" affiliation with any political party without the assent of the political party.
4. Attached hereto as Exhibit C is a true and correct copy of the statewide Primary Election Results for 1998-2004 in Washington taken from the Secretary of State website, together with a spreadsheet of the same data showing the proportionate ballot strength of the top four candidates in each race.
5. Attached hereto as Exhibit D is a true and correct copy of the Emergency Rule Order dated 5/08/05 for implementing I-872. WAC 424-215-015 provides RCW §§ 29A.20.110 through 29A.20.201 (minor party nominating statutes) apply only to nominations for President and Vice President.
6. Attached hereto as Exhibit E is a true and correct copy of the current Constitution and Bylaws of the Libertarian Party of Washington State. Constitution Article IV requires endorsement of a "non-aggression" pledge to be a member of the party.

Constitution Article XIII requires that all Libertarian candidates for partisan office shall be members of the party.

7. Attached hereto as Exhibit F is a true and correct copy of an Authenticating Declaration and Certificate of Registration showing registration of the name "Libertarian Party" in the United States Patent and Trademark Office.

8. Attached hereto as Exhibit G is a true and correct copy of an article in *Ballot Access News*, dated June 1, 2005, page 4. Author Richard Winger is a nationally recognized ballot access expert. In the article he has compiled tables of state-by-state averages for number of candidates on the November ballot for United States Senator and Governor and the proportionate number of signatures or votes needed for access to the November ballot.

9. Attached hereto as Exhibit H is a true and correct copy of a Memorandum to the Conference by Justice Potter Stewart regarding *Jernigan v. Lendall*, dated 6/21/77. This memorandum discusses the propriety of a ballot access threshold for minor parties of greater than 5%.

DATED Friday, June 17, 2005, at Tacoma, Washington.

SHEPARD LAW OFFICE, INC.,

Richard Shepard

RICHARD SHEPARD, WSBA # 16194

EXHIBIT B

R.C.W. § 29.15.010 Declaration and affidavit of candidacy

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration and affidavit of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) A place for the candidate to indicate a party designation, if applicable;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under R.C.W. § 29.15.050;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

EXHIBIT C

Top Four Primary Results from 1998-2004

U.S. Senate

1998		**Percentage of Votes**
Candidate 1	Patty Murray-D	0.46
Candidate 2	Linda Smith-R	0.32
Candidate 3	Chris Bayley-R	0.15
Candidate 4	Warren Hanson-R	0.02

Governor

2000		**Percentage of Votes**
Candidate 1	Gary Locke-D	0.54
Candidate 2	John Carlson-R	0.35
Candidate 3	Harold Hochstatter-R	0.07
Candidate 4	Meta Heller-D	0.02

Lt. Governor

2000		**Percentage of Votes**
Candidate 1	Brad Owen-D	0.44
Candidate 2	Mike Elliott-R	0.24
Candidate 3	Joe Mitschelen-R	0.14
Candidate 4	Lonnie Williams-D	0.11

Secretary of State

2000		**Percentage of Votes**
Candidate 1	Sam Reed-R	0.22
Candidate 2	Don Bonker-D	0.21
Candidate 3	Bob Terwilliger-D	0.12
Candidate 4	Mike Wensman-R	0.10

State Treasurer

2000		Percentage of Votes
Candidate 1	Mike Murphy-D	0.47
Candidate 2	Diane Rhoades-R	0.41
Candidate 3	Louis Bloom-D	0.07
Candidate 4	Tim Perman-LBT	0.05

State Auditor

2000		Percentage of Votes
Candidate 1	Brian Sonntag-D	0.56
Candidate 2	Richard McEntee-R	0.38
Candidate 3	Chris Caputo-L	0.06

Attorney General

2000		Percentage of Votes
Candidate 1	Christine Gregoire-D	0.55
Candidate 2	Richard Pope-R	0.39
Candidate 3	Richard Shepard-L	0.04
Candidate 4	Luanne Coachman-NL	0.01

Commissioner of Public Lands

2000		Percentage of Votes
Candidate 1	Doug Sutherland-R	0.33
Candidate 2	Mike Lowry-D	0.29
Candidate 3	Georgia Gardner-D	0.12
Candidate 4	Jim O'Donnell-D	0.06

Superintendent of Public Instruction

2000		Percentage of Votes
Candidate 1	Teresa Bergeson-NP	0.57
Candidate 2	Donald Crawford-NP	0.15
Candidate 3	Arthur Hu-NP	0.14
Candidate 4	David Blomstrom-NP	0.08

Insurance Commissioner

2000		Percentage of Votes
Candidate 1	Mike Kreidler-D	0.33
Candidate 2	Don Davidson-R	0.29
Candidate 3	John Conniff-D	0.21
Candidate 4	Curtis Fackler-R	0.12

Governor

2004		Percentage of Votes
Candidate 1	Christine Gregoire-D	0.39
Candidate 2	Dino Rossi-R	0.34
Candidate 3	Ron Sims-D	0.18
Candidate 4	John Aiken, Jr.-R	0.03

Lt. Governor

2004		Percentage of Votes
Candidate 1	Brad Owen-D	0.59
Candidate 2	Jim Wiest-R	0.16
Candidate 3	Jim Nobles-R	0.14
Candidate 4	Scott Bonifield-R	0.09

Secretary of State

2004		Percentage of Votes
Candidate 1	Laura Ruderman-D	0.57
Candidate 2	Sam Reed-R	0.42
Candidate 3	Jacqueline Passey-L	0.01

State Treasurer

2004		Percentage of Votes
Candidate 1	Mike Murphy-D	0.59
Candidate 2	Oscar Lewis-R	0.40
Candidate 3	John Sample-L	0.01

State Auditor

2004		Percentage of Votes
Candidate 1	Brian Sonntag-D	0.59
Candidate 2	Will Baker-R	0.40
Candidate 3	Jason Bush-L	0.01

Attorney General

2004		Percentage of Votes
Candidate 1	Rob McKenna-R	0.31
Candidate 2	Deborah Senn-D	0.31
Candidate 3	Mark Sidran-D	0.29
Candidate 4	Mike Vaska-R	0.08

Commissioner of Public Lands

2004		Percentage of Votes
Candidate 1	Mike Cooper-D	0.58
Candidate 2	Doug Sutherland-R	0.41
Candidate 3	Steve Layman-L	0.01

Superintendent of Public Instruction

2004		Percentage of Votes
Candidate 1	Teresa Bergeson-NP	0.36
Candidate 2	Judith Billings-NP	0.35
Candidate 3	John Blair-NP	0.01
Candidate 4	Juanita Doyon-NP	0.01

Insurance Commissioner

2004		Percentage of Votes
Candidate 1	Mike Kreidler-D	0.59
Candidate 2	John Adams-R	0.22
Candidate 3	Earl Adams-R	0.01
Candidate 4	Curtis Fackler-R	0.01

EXHIBIT E

Constitution of the Libertarian Party of Washington State

As amended in convention, May 1, 2004

Statement of Principles

We, the members of the Libertarian Party of Washington State, hold these truths to be self-evident, that all men and women are created equal, that they are endowed with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. Accordingly, all individuals have the right to exercise sole dominion over their lives, and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the equal right of others to live in whatever manner they choose.

We further hold that where government exists, it must not violate the right of any individual: namely (1) the right to life - accordingly, we support prohibition of the initiation of physical force against others; (2) the right to liberty of speech and action – accordingly we oppose all attempts by government to abridge the freedom of speech and the press, as well as government censorship in any form; and (3) the right to property – accordingly, we oppose all government interference with private property, such as confiscation, nationalization, and eminent domain, and support the prohibition of robbery, trespass, fraud, and misrepresentation.

Since governments, when instituted, must not violate individual rights, we oppose all interference by government in the areas of voluntary and

contractual relations among individuals. People should not be forced to sacrifice their lives or property for the benefit of others. They should be left free by government to deal with one another as free traders; and the resultant economic system, the only one compatible with the protection of individual rights, is the free market.

Towards these ends, the following articles comprise our Constitution:

Article I: Name

The name of this organization will be the Libertarian Party of Washington State, hereinafter referred to as "the Party."

Article II: Purpose and Duration

The purpose of the Party is to proclaim and implement its Statement of Principles by:

1. Nominating and running candidates for office in the State of Washington;
2. Entering into political information and educational activities;
3. Promoting, chartering, and coordinating regional organizations throughout the State of Washington;
4. Calling conventions of Libertarian Party members within the State of Washington;
5. Providing delegates for national Libertarian Party conventions;
6. And filing vacancies on the Libertarian Party ticket.

The duration of this party will be perpetual.

Article III: Controlling Documents

The controlling documents of the Party are this Constitution and the Party Bylaws. Authority for procedures not otherwise addressed in the Controlling Documents is Robert's Rules of Order, newly revised.

Article IV: Membership

The controlling documents of the Party are this Constitution and the Party Bylaws. Authority for procedures not otherwise addressed in the Controlling Documents is Robert's Rules of Order, newly revised.

1. Any person residing within the State of Washington, and who endorses in writing the following statement: "I do not believe in or advocate the initiation of force as a means of achieving political or social goals," and who meets the criteria established by the controlling documents is a member of the party.
2. The requirement and standards for membership will be set forth in the Party Bylaws.

Article V: Officers

1. The Party shall have four (4) Party Officers, as follows: State Chair, Vice-Chair, Treasurer and Secretary.
2. Party Officers will be elected individually, on separate ballots, in the order set forth above, at the annual Party Convention. No offices

shall be combined. When three or more candidates run for an office, the election shall be conducted using an instant runoff vote.

3. Terms of office for Party Officers will commence thirty (30) days after adjournment of the annual convention in odd numbered years, and terminate thirty days after adjournment of the annual convention in the succeeding odd numbered years.

4. Only Party members eligible to vote at the annual Party convention may serve as Party Officers.

5. Party Officers have the executive powers and duties of the Party. Additional powers and duties of the Party Officers are set forth herein and in the Bylaws.

6. Party Officers may delegate their powers and/or duties to other party members upon the advice and consent of the State Executive Committee.

7. In the event that the office of State Chair becomes vacant, the Vice-Chair shall become the State Chair for the remainder of the term.

8. The State Executive Committee may, by a two-thirds (2/3) majority vote of the current members, appoint or reinstate Party Officers other than the State Chair if vacancies or suspensions occur, such officers to serve the remainder of the vacated term.

9. Any Party Officer may be suspended for cause by a two-thirds (2/3) majority vote of the State Executive Committee. The Vice-Chair is

recused from voting to suspend the State Chair.

10. A Party Officer may challenge his/her suspension by written appeal to the Judicial Committee within thirty (30) days of receipt of notice of such suspension. Failure to appeal within thirty (30) days shall confirm the suspension and bar any later challenge or appeal.

Article VI: State Executive Committee

A. Membership:

1. The State Executive Committee will be composed of representatives from each of the U.S. Congressional districts for the State of Washington. Representatives must be Party members and will be designated by Party members in their respective districts.

2. Party members from each Congressional district who are in attendance at the annual Party convention shall select members and alternates from the affected district to the State Executive Committee in any manner they choose.

3. The Party Vice-Chair, Treasurer and Secretary are at-large members of the State Executive Committee.

4. The State Chair shall preside at State Executive Committee meetings, and may vote only if the Chair's vote would change the outcome.

B. Powers:

1. The State Executive Committee will have all policy making, investigatory and review authority over all the affairs, properties, and funds of the Party, not prohibited by the Controlling Documents of the Party.
2. The State Executive Committee will meet in the manner, and conduct itself according to rules as provided in the Party Bylaws.
3. The State Executive Committee shall have the power to appoint committees as provided in the Party Bylaws. A Party Officer may not chair a standing committee established by the Party Bylaws.
4. The State Executive Committee may never expel a member from the Party, but may petition the Judicial Committee to expel a member of the Party upon a 2/3 vote.

Article VII: Statutory State Committee

A. Membership:

The Statutory State Committee shall be composed of Party members who have been selected by Statutory County Committees to serve on the Statutory State Committee.

B. Powers:

1. The Statutory State Committee has the following powers:
   a. To call conventions of Libertarian Party members within the State of Washington;

b. To provide delegates for National Libertarian Party conventions;

c. To nominate Presidential electors; and

d. To fill vacancies on the Libertarian Party ticket.

2. The Statutory State Committee will meet in the manner, and conduct itself according to rules as provided in the Party Bylaws.

3. The Statutory State Committee may delegate its powers to the State Executive Committee, or to an appropriate standing committee created by the controlling documents, or to the Party Convention.

Article VIII: Judicial Committee

A. Membership:

1. The Judicial Committee will consist of not more than nine (9) Party members.

2. A candidate for election to the Judicial Committee must be a Party member for three (3) years.

3. Party Officers and members of the State Executive Committee and the Statutory State Committee are not eligible to serve on the Judicial Committee.

4. Members of the Judicial Committee shall be elected at each annual convention and serve for a period specified in the Bylaws, unless they are recalled by a two-thirds (2/3) majority vote at a Party convention.

5. Within sixty (60) days of each annual convention the Judicial Committee shall elect from its members a Chief Justice.

6. Vacancies on the Judicial Committee will be filled at the next annual Party convention.

B. Powers:

1. The Judicial Committee shall hear appeals or petitions from Party members concerning:

   a. Interpretation of the controlling documents;

   b. Disputes involving access to Party records;

   c. Suspension of Party Officers; and

   d. Disputes involving representation on the State Executive Committee, or the Statutory State Committee or its committees.

2. The Judicial Committee shall review any petition by the State Executive Committee to expel a member from the Party. The Judicial Committee must either dismiss such petition or refer such petition to the Convention, or to any properly called Special Convention, for a final determination.

3. Decisions of the Judicial Committee shall be limited to summary affirmation or reversal of any official act of a Party Officer, or the State Executive Committee or the Statutory State Committee. The State Executive Committee, or the Statutory State Committee or the appellant/petitioner may request a written opinion from the Judicial Committee.

4. Judicial Committee decisions are subject to repeal by a two-thirds (2/3) majority vote of members at the next annual Party convention.
5. The Judicial Committee will meet in the manner and conduct themselves according to the Party Bylaws.

Article IX: Regional Organizations

1. The State Executive Committee may charter as regional organizations those organizations requesting such status, to represent counties or other political or geographical entities, if requested by affected members and approved by the State Executive Committee. Regional Organizations may be, in the sole and exclusive discretion of the State Executive Committee, Statutory County Committees. Regional organizations will be chartered for the following purposes:
   a. Nomination of candidates for public office.
   b. Working to elect Libertarian candidates and promoting Libertarian principles through political information and educational activities.
   c. Selecting representatives to appropriate Party activities.
2. Every organization so chartered will ratify the Statement of Principles of the LPWS and provide the names and titles of its regional officers to the State Executive Committee annually.

Article X: Statutory County Committees

A. Membership:

Statutory County Committees are composed of current dues paying Party members who are elected as Precinct Committee Officers in their County, or dues paying Party members in the County who are appointed by the committee chair.

B. Powers:

1. Statutory County Committees shall select from their numbers up to two representatives to the Statutory State Committee. Any representative to the Statutory State Committee must have been a member of the Party for 1 year.
2. Statutory County Committees shall have such other powers as may be delegated by these controlling documents or by the State Executive Committee.
3. The Statutory County Committee will meet in the manner, and conduct itself according to rules as provided in the Party Bylaws.

Article XI: Party Conventions

A. Annual Convention:

1. The Party will meet in convention as provided in the convention rules and the Party Bylaws.
2. Any current dues-paying Party member as determined by the State Executive Committee for ninety (90) calendar days prior to a State convention may vote at that convention.

3. The rules for each convention will be adopted by the convention as its first order of business. A simple majority of those delegates present and voting will be sufficient for adoption.

4. At annual conventions Party Officers and Judicial Committee members shall be elected as provided in the Bylaws, a Party Platform may be adopted or revised, the Constitution and Bylaws may be Amended, resolutions may be adopted and candidates for public office may be nominated.

5. The convention date(s) and location city shall be announced in the Party's member newsletter, at least sixty (60) calendar days prior to the annual convention.

6. In years when a National Libertarian Party Convention is to be held, the annual convention will elect delegates and alternates to the national convention in accordance with procedures set forth in the Party Bylaws. In the event of conflict, selections made by the annual Party convention shall have priority over the selections of the Statutory State Committee.

7. In years when a United States Presidential Election is to be held, the annual convention will elect representatives to the United States Electoral College. In the event of conflict, the selections made by the annual Party convention shall have priority over the selections of the Statutory State Committee.

B. Special Conventions:

1. The State Executive Committee may call a special convention by a four-fifths (4/5) majority vote of those present at a regular State Executive Committee meeting. In the event of conflict, the convention date selected by the State Executive Committee shall have priority.
2. Members of the Party may call a special convention by submitting a petition to the State Chair, signed by at least twenty-five (25) percent of the membership of the Party. Those petitioning will bear all costs including required notification.

Article XII: Platform

1. The Party may adopt a Platform or plank at the annual Party convention by a two-thirds (2/3) majority vote of delegates in attendance.
2. Any Platform plank, or the entire Platform, may be repealed by a simple majority vote of delegates at the convention.
3. All platform planks shall be consistent with the Statement of Principles of the Party.

Article XIII: Nomination of Candidates

1. All Libertarian candidates for partisan office shall be members of the Party, and shall be nominated by members of the Party.
2. In the event of conflict, the person(s) selected to fill vacancies on the Libertarian party ticket by the Campaigns Committee or other committee delegated with such power by the

annual Party convention shall have priority over the selections of the Statutory State Committee.

3. Nomination of candidates for public office will be according to this Constitution and the Party Bylaws.

Article XIV: Amendments

1. The Statement of Principles, preamble of this Constitution, affirms the philosophy upon which the Libertarian Party is founded, upon which it shall be sustained, and through which liberty shall prevail. The enduring importance of the Statement of Principles requires that it may be amended only by a seven-eighths (7/8) majority vote of all delegates at an annual convention.
2. This Constitution may be amended by a two-thirds (2/3) majority vote of delegates in attendance at any party convention.
3. The Party Bylaws may be amended by a majority vote of delegates in attendance at any Party convention.

Bylaws
of the
Libertarian Party of Washington State

As amended in convention, May 1, 2004

Article I: Membership

1. Anyone meeting the requirements of membership as determined by the State

Executive Committee and residing in the State of Washington is hereby a member of the Party.

2. Dues paying Party members as determined by the State Executive Committee shall receive a subscription to the Party newsletter, plus other incidental benefits to be determined by the State Executive Committee.

3. An individual may maintain only one membership in the Party.

4. Any member may require that his or her membership information may not be distributed to any organization not affiliated with the Libertarian Party of Washington State (LPWS). An affiliate of the LPWS is defined as the Libertarian National Committee, and chartered regional chapters of the LPWS.

5. Any member has a right to contact the general membership of the Party concerning Party business; the State Executive Committee shall establish procedures for so contacting the membership.

6. Any LPWS member may obtain upon payment of reasonable cost the name, addresses, phone number, and e-mail addresses on announcement lists when available of all or any members.

Article II: Party Officers

A. Generally:

1. Any Officer who may have a conflict of interest in discharging his or her duties as an Officer

shall fully advise the State Executive Committee regarding the possible conflict.

2. Each party Officer will be responsible for maintaining documentation within his/her area of responsibility.
3. Each officer will be responsible for transferring all records and accounts pertaining to his/her area of responsibility within thirty (30) days after the election or appointment of his/her successor.
4. Each Party Officer will provide a written report to be presented at the annual Party Convention and passed on to the next Officer.
5. No Party Officer may incur expenses beyond budget without approved of the State Executive Committee.

B. State Chair:

1. The State Chair shall be the chief executive officer and chief spokesperson of the Party, holding all powers pertaining to the ordinary business affairs of the Party.
2. The State Chair may appoint, hire and discharge Party volunteers and paid personnel, such as an office manager and an events chair, consistent with any express State Executive Committee policies.
3. The State Chair may contract for products and services, consistent with any express State Executive Committee policies.
4. The State Chair shall be a voting member of the Strategic Planning Committee.

C. Vice-Chair:

1. The Vice-Chair shall assume the duties and responsibilities of the State Chair in the event of his/her resignation, incapacity, death, suspension, or absence.
2. The Vice-Chair shall be a voting member of the Public Relations and Campaigns Committees.

D. Treasurer:

1. The Treasurer shall be responsible for establishing and maintaining a system of accounts in accordance with Generally Accepted Accounting Practices.
2. The fiscal year of the Party shall begin on August 1st of each year.
3. In the event the Treasurer is unable to perform the duties of the office the records of the Party shall revert to the State Chair.
4. The Treasurer shall make Party financial records, excluding the names of contributors, available to any Party member in good standing at a reasonable time and place upon fourteen (14) calendar days' notice.
5. The Treasurer shall be a voting member of the Finance and Policy Committees.

E. Secretary:

1. The Secretary will be responsible for recording the minutes of the State Executive Committee meetings and Party conventions.

2. The Secretary will ensure that draft copies of convention minutes are available to Party members within Thirty (30) days following a convention.

3. The Secretary shall notify State Executive Committee members of the time and location of meetings.

4. The Secretary shall be a voting member of the Membership and Policy Committees.

5. The Party Secretary is responsible for Party membership records, Party archives, and all other records not otherwise provided for in the Controlling documents.

Article III: State Executive Committee

A. Meetings:

1. The State Executive Committee shall convene only in open meeting. Within a properly announced open meeting, a closed "Executive Session" may be convened to discuss the following confidential matters: contracts worth more than $1000 per year, personnel and/or disciplinary matters requiring State Executive Committee action, and pending or active litigation. The purpose of the private session shall be announced prior to convening privately, and no votes may be taken until the open meeting is reconvened, at which time motions and discussion may or may not proceed.

2. The State Executive Committee shall meet at least quarterly, as may be determined by the Committee, or by a call of the State Chair, or

by written request of one-third (1/3) or more of the members of the Committee.

3. A quorum for State Executive Committee meetings will consist of at least half the current total Committee members, If neither the Chair nor the Vice Chair is in attendance, a simple majority of attending members may elect a Presiding Chair *pro tem*.

B. Rules and Procedures:

1. All State Executive Committee members shall be notified of the time and location of meetings no less than twenty-one (21) days in advance; provided that, in the case of emergency meetings called by the State Chair seven (7) days shall be adequate. Emergency meetings may be held online or via telephone, to consider a single question, if a recorded vote includes at least 2/3 of State Executive Committee members, and with Meeting Minutes recorded and filed.

2. The State Executive Committee may adopt such rules of procedure as it deems necessary.

3. In case of a dispute between Party members of the same region for the same seat on the State Executive Committee, the undisputed State Executive Committee members present shall determine by majority vote which member shall be seated for that meeting. In the event of an appeal to the Judicial Committee, if the wrong person was seated, official action taken or business conducted at the subject meeting shall not be affected.

4. Any petition to the Judicial Committee to expel a member from the Party shall be preceded by a written motion to the State Executive Committee summarizing the reasons for expulsion. The motion will require two seconds to be considered. Any Party member subject to a motion for petition to expel shall receive a copy of the written motion 30 days before the matter may be considered by the State Executive Committee and given a reasonable opportunity to be heard in a regular meeting of the State Executive Committee before a dispositive vote is taken. In the event a motion for petition to expel a member passes the State Executive Committee, the State Executive Committee shall select one of its members to represent the State Executive Committee in its petition to the Judicial Committee.

C. Committees:

1. The State Executive Committee shall establish and maintain the following Standing Committees: Campaigns, Membership, Public Relations, Finance, and Policy. Standing Committee Chairs will be appointed or terminated by the State Chair, with the approval of the State Executive Committee.

2. Standing Committees shall have the powers of investigation, supervision, and review of the Party activities within their area of responsibility, and shall have access to all records of the Party. Standing Committee Chairs hold primary responsibility for staffing

their Committees, and/or forming and staffing committees.

3. The responsibilities of the standing committees will be, but are not limited to, the following:

   a. The Campaigns Committee will identify political races and coordinate candidate and issue development.

   b. The Membership Committee will recruit new members, develop membership educational programs and publications, and assist in organizing regional organizations.

   c. The Public Relations Committee will coordinate news media, disseminate information within and for the Party, and operate a speakers' bureau.

   d. The Finance Committee will have the primary responsibility for fund raising.

   e. The Policy Committee has primary responsibility for creating and maintaining a Policy Manual.

   f. The Strategic Planning Committee will create, maintain and update a 5-year Strategic Plan, for approval by the State Executive Committee.

4. The State Executive Committee may establish Temporary Committees, by approving a written and amendable delegation of powers and/or function. Standing Committees may form Temporary Subcommittees on the same

basis. Temporary Committees will expire after 12 months, unless renewed by the originating body. Temporary Committee Chairs will be appointed or terminated by the State Chair, with the approval of the State Central Committee.

Article IV: Statutory State Committee

A. Meetings:

1. The Statutory State Committee shall convene only in open meeting.
2. The Statutory State Committee shall meet during January of each odd-numbered year, and as may be determined by the Committee, or by a call of the State Chair.
3. A quorum for the Statutory State Committee meetings will consist of at least half the current total Committee members.
4. Except for the meeting held during January of each odd-numbered year, and provided that proper notice and open access is given, the Statutory State Committee may, in its discretion, meet on-line.

B. Rules and Procedures:

1. Notice of the Statutory State Committee meeting held in January of each odd-numbered year shall be made seven (7) days in advance to all Statutory County Committees lawfully organized pursuant to Chapter 29.42, R.C.W. Notice of the time, location and agenda of all other Statutory State Committee

meetings shall be made no less than twenty-one (21) days in advance.

2. The presiding officer at Statutory State Committee meetings shall ensure that minutes are regularly taken and that the minutes shall be available to any Party member upon request.

3. The Statutory State Committee may adopt such additional rules of procedures as it deems necessary.

Article V: Judicial Committee

A. Generally:

1. Members of the Judicial Committee shall serve for a term of three years.

2. No member of the Judicial Committee may sit in judgment of an appeal of a ruling or action of the State Executive Committee or the Statutory State Committee, which occurred while that member served on either Committee.

3. The Judicial Committee shall, when required by its duties, have access to all written records of the Party and Party committees concerned.

4. A ruling of the Judicial Committee may be overturned by a two-thirds (2/3) majority vote of the delegates at a convention.

B. Chief Justice:

1. The Chief Justice may not serve consecutive terms as Chief Justice.

2. The Chief Justice will receive all appeals and petitions, and schedule hearings so as to obtain a quorum of the Judicial Committee.

C. Timing and Notification:

1. The Chief Justice must notify the Party Officers within seven (7) days that an appeal or petition has been received and provide the substance.
2. The Chief Justice shall provide at least fourteen (14) calendar day's notice to all interested Parties to a hearing, unless otherwise agreed to by all Parties concerned.
3. Hearings must be held within forty-five (45) calendar days from the time a written request is received by the Chief Justice, unless otherwise agreed to by all parties concerned.
4. The Judicial Committee must provide a ruling within fifteen (15) calendar days of the conclusion of a hearing, unless otherwise agreed to by all parties concerned.

D. Hearings:

1. In hearing a petition to expel a member from the Party, a quorum of the Judicial Committee will consist of 7/8 of its members. In all other matters, a quorum of the Judicial Committee will consist of a simple majority.
2. All parties to a hearing will have the right to represent their interests in the manner of their own choosing, consistent with the rules, guidelines, and principles of the Judicial Committee.

3. With the consent of all parties, the Chief Justice may call for written arguments and a mail ballot of committee. Unless the parties agree otherwise, the Judicial Committee must provide a ruling within sixty (60) calendar days of the date of the original appeal or petition.

Article VI: Regional Organizations

1. The State Executive Committee will promote and charter regional organizations.

2. Organizations applying for regional organization status will petition the State Executive Committee. The petition will explicitly ratify the State of Principles of the National Party and will be signed annually by no fewer than five (5) Party members residing in that region.

3. The State Executive Committee will have the power to suspend regional organizations by a two-thirds (2/3) vote. Suspension is subject to written appeal to the Judicial Committee within thirty (30) calendar days of notification of suspension. Upon failure to appeal, the charter of the regional organization will be revoked. The State Executive Committee will not suspend any regional organization within a period of four (4) months prior to the annual convention. A regional organization may be suspended from the Party for the following reasons:

   a. Violating the Statement of Principles.

b. Endorsing or supporting a candidate in opposition to one nominated by a recognized branch of the Libertarian Party.

c. Failing to hold a local meeting within the region at least once every calendar quarter.

Upon appeal by the regional organization, the Judicial Committee will conduct a hearing. Following the hearing, the Judicial Committee will have thirty (30) calendar days to decide either to revoke the charter of the regional organization, or to continue the charter. Until the Judicial Committee decides, the regional organization charter will continue to be in force.

4. Members of the Party residing in unchartered regions may petition the State Executive Committee for recognition as chartered regions; such petitions must identify boundaries such as county lines, and must meet requirements set forth in the controlling documents.

Article VII: Statutory County Committees

1. A Statutory County Committee may petition for Regional Organization status under Article X of the Party Constitution and Article VI of these Bylaws. The petition will explicitly ratify the Statement of Principles of the Party and will be signed by no fewer than five (5) Party members who are also Statutory County Committee members residing in that county.

2. A Statutory County Committee shall conduct business related to statutory powers only in open meeting.

3. The presiding officer at Statutory County Committee meetings shall ensure that minutes are regularly taken and that the minutes shall be available to any Party member upon request.

4. The Statutory County Committee may adopt such additional rules of procedure as it deems necessary.

Article VIII: Party Conventions

A. Generally:

1. The annual Party convention shall be held in the first or second quarter of the calendar year, or a date selected by the State Executive Committee.

2. Credentials for any convention will be determined by the Credentials Chair, consistent with the controlling documents of the Party.

3. A quorum for the convention business shall consist of no less than 3% of the total current Party membership.

B. Convention Committees:

1. The convention committees are the Constitution and Bylaws Committee, Platform Committee, Nominating Committee, Credentials Committee, and Rules and Resolutions Committee.

2. Convention Committee Chairs will be appointed or terminated by the State Chair, with the approval of the State Executive Committee. The State Chair will announce at the State Party convention that the State Chair will appoint the Convention Organizing Committee Chair and the chairs of the convention committees at the first scheduled State Executive Committee meeting to occur fifteen (15) days or more after that State Party convention. In addition to a Committee Chair, each committee may consist of up to twelve (12) Party members, selected by the State Executive Committee. After the State Executive Committee meeting any unfilled positions may be filled by either the State Executive Committee or by the respective convention committee chairs.

3. All convention committee meetings will be open to all Party members, who may obtain the committees schedules from their respective chairs.

4. Chairs of the convention committees will be responsible for completion and reproduction at party expense of their final committee reports.

5. The chairs of the Constitution and Bylaws Committee and the Platform Committee will certify and cause to be published at party expense each document in its entirety as amended by the convention.

6. The Nominating Committee is responsible for identifying candidates for internal Party positions (such as state officer or Judicial

Committee member) and should only do so for positions which do not have announced candidacies within 30 days of the annual party convention.

7. Each committee, except the Nominating Committee, shall submit a written report to the Party Secretary not later than thirty (30) days prior to the Party convention.

8. Convention committee reports shall be available, upon request, to any Party member.

9. The State Chair will ensure that the committee's reports, and the reports of committee members submitted separately, are presented at the convention.

C. Elections for National Party conventions:

1. All delegates and representatives to national conventions of the Libertarian Party must be members of the State and National Parties.

2. The State Chair will announce to the convention body the total number of delegates and representatives to national party convention committees, and the number to be selected by the State Party convention.

3. Nominations of delegates from the floor shall not require seconds. Members may nominate themselves.

4. After the election of delegates, alternate delegates may be elected.

5. After the election of delegates and alternates, representatives to national committees may be elected.

6. The duly elected delegates present at the convention will select a Delegation Chair and determine their own substitution procedures.

7. A list of the delegates and alternates, and a description of the substitution procedures, shall be submitted by the Delegation Chair to the State Chair and the National Secretary within seven (7) calendar days of the convention.

D. Elections for Judicial Committee members:

1. Three (3) new Judicial Committee members shall be elected at each annual Party convention by single transferable vote. In the event of a resignation or vacancy on the Judicial Committee, a member shall also be elected to complete the term of the original member.

2. Nominations of qualified candidates will be accepted from the floor. Members may nominate themselves. All nominations require a second.

3. The Rules Committee will determine procedures for electing Judicial Committee members.

E. Nominating and Endorsing candidates:

1. Only the party's regional organizations and convention delegates have power to nominate Libertarian party candidates for partisan offices, and to endorse candidates for non-partisan offices.

a. Delegates may nominate and endorse candidates for any office.

b. After the convention adjourns, power to nominate and endorse will transfer from delegates to the Campaigns Committee, but regional organizations also retain their power to nominate or endorse even after the convention adjourns.

c. In the event more than one regional organization, or regional organizations and the Campaigns Committee, or the convention, nominates more than one candidate either before, at, or after the convention, then all such candidates become nominees and are authorized to appear on the libertarian Primary ballot. But if there is no primary election, then the following rules apply to determine the party nominee for the general election:

   1. That candidate winning approval by a majority of the convention delegates or of the Campaigns Committee is the party nominee unless a regional organization covering the entire jurisdiction served by a candidate shall have also nominated a candidate, in which event the regional organization's candidate shall be the party nominee.

   2. In the event two or more regional organizations cover the entire jurisdiction served by a candidate and nominate different candidates, that candidate of the smallest regional

organization (by geographical area) shall be the Party nominee.

2. The nomination of a Libertarian Party candidate or endorsement of a non-partisan candidate during or after the convention may be withdrawn for cause by a three-fourths (3/4) majority vote of State Executive Committee members.

3. "None of the Above" (NOTA) may be nominated, seconded and supported on the same basis as an actual candidate, for either partisan or non-partisan endorsements. If "NOTA" wins a majority of votes, there shall be no endorsement for that office.

EXHIBIT F

DECLARATION
(Regarding Libertarian Party® Trademark)

To Whom It May Concern:

I am General Counsel to the Libertarian National Committee, Inc., the governing body of the national Libertarian Party®, and have continuously served as General Counsel since 1991. As such, I have personal knowledge of the facts set forth in this Declaration.

The Libertarian National Committee, Inc., owns the trademark Libertarian Party®. Attached is a true, accurate and complete copy of its trademark registration, as issued by the United States Patent Office. This trademark registration has not been revoked, withdrawn or amended, and is currently in full force and effect. The Libertarian National Committee and its affiliated parties and candidates have continuously used the trademark Libertarian Party® since the time it was registered with the United States Patent Office, and prior to that time, since approximately 1972.

Under the national bylaws of the Libertarian Party®, the Libertarian National Committee's recognized affiliate in each state is permitted the use of the trademark Libertarian Party® for its political operations, and for use by its designated candidates, within its state. In the State of Washington, the Libertarian National Committee has recognized the Libertarian Party of Washington State, PO Box 7118, Bellevue, WA 98008, with an office at 15831 NE 8th, Ste. 210, Bellevue, WA 98008, as its state affiliate. The Libertarian National Committee has not granted to any other person within the State of

Washington the right to use the trademark Libertarian Party®.

I declare under penalty of perjury according to 28 U.S.C., § 1746 that the foregoing is true and correct.

Executed on June 16, 2005, at Grand Rapids, Michigan.

William W. Hall

William W. Hall

THE UNITED STATES OF AMERICA

[logo]

CERTIFICATE OF REGISTRATION

PRINCIPAL REGISTER

The Mark shown in this certificate has been registered in the United States Patent and Trademark Office to the name registrant.

The records of the United States Patent and Trademark Office show that an application for registration for the Mark shown in this Certificate was filed in the Office; that the application was examined and determined to be in compliance with the requirements of the law and with the regulations prescribed by the Director of the United States Patent and Trademark Office; and that the Applicant is entitled to registration of the Mark under the Trademark Act of 1946, as Amended.

A copy of the Mark and pertinent data from the application are part of this certificate.

This registration shall remain in force for TEN (10) years, unless terminated earlier as provided by law, and subject to compliance with the provisions of Section 8 of the Trademark Act of 1946, as Amended.

Nicholas P. Godici

Acting Director of the United States Patent and Trademark Office

[seal]

Requirements for Maintaining a Federal Trademark Registration

SECTION 8: AFFIDAVIT OF CONTINUED USE

The registration shall remain in force for 10 years, except that the registration shall be canceled for failure to file an Affidavit of Continued Use under Section 8 of the Trademark Act, 15 U.S.C. § 1058, upon the expiration of the following time periods:

i) At the end of 6 years following the date of registration.

ii) At the end of each successive 10-year period following the date of registration.

Failure to file a proper Section 8 Affidavit at the appropriate time will result in the cancellation of the registration.

SECTION 9: APPLICATION FOR RENEWAL

The registration shall remain in force for 10 years, subject to the provisions of Section 8, except that the registration shall expire for failure to file an Application for Renewal under Section 9 of the Trademark Act, 15 U.S.C. § 1059, at the end of each successive 10-year period following the date of registration.

Failure to file a proper Application for Renewal at the appropriate time will result in the expiration of the registration.

No further notice or reminder of these requirements will be sent to the Registrant by the Patent and Trademark Office. It is recommended that the Registrant contact the Patent and Trademark office approximately

one year before the expiration of the time periods shown above to determine the requirements and fees for filings required to maintain the registration.

Int. Cls.: 16 and 42

Prior U.S. Cls.: 2, 5, 22, 23, 29, 37, 38, 50, 100 and 101

Reg. No. 2,423,459

United States Patent and Trademark Office
Registered Jan. 23, 2001

TRADEMARK
SERVICE MARK
PRINCIPAL REGISTER

LIBERTARIAN PARTY

LIBERTARIAN NATIONAL COMMITTEE, INC. (D.C. NON-PROFIT CORPORATION)
2600 VIRGINIA AVENUE, N.W., SUITE 100
WASHINGTON, DC 20037

FOR: NEWSPAPERS, BROCHURES, PAMPHLETS AND BOOKLETS CONCERNING POLITICAL ISSUES, IN CLASS 16 (U.S. CLS. 2, 5, 22, 23, 29, 37, 38 AND 50).

FIRST USE 1-0-1972; IN COMMERCE 1-0-1972.

FOR: POLITICAL PARTY SERVICES, NAMELY, PROMOTING THE INTERESTS OF A POLITICAL PARTY, IN CLASS 42 (U.S. CLS. 100 AND 101).

FIRST USE 1-0-1972; IN COMMERCE 1-0-1972.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "PARTY", APART FROM THE MARK AS SHOWN.

SER. NO. 75-937,476, FILED 3-7-2000.

PRISCILLA MILTON, EXAMINING ATTORNEY

EXHIBIT G

GOVERNOR, SENATOR ACCESS COMPARISON

The March *B.A.N.* compared the states on how easy it is for minor party and independent *presidential* candidates to get on the ballot. The April 1 *B.A.N.* compared the states on how easy it is for a group to be a *qualified party*. The May 1 chart compares them on how easy it is for a new party to get a full slate of *U.S. House* candidates on the November ballot. This chart compares the states for access in *U.S. Senate* and *gubernatorial* elections, for independent and minor party candidates.

The chart in the middle column tells the average number of candidates on the November ballot for Governor and U.S. Senator in each state (including the Democratic and Republican nominees), for the period 1980-2004. The states are ordered with the most lenient at the top, and the most restrictive at the bottom. Arkansas, New Mexico and Maryland have offered voters the fewest choices for Governor and U.S. Senator. However, Maryland drastically improved ballot access in 1998 and again in 2003, so its future ranking will surely improve.

The nationwide average for U.S. Senate and gubernatorial elections is 3.73 candidates on the ballot. This contrasts with 2.60 candidates on the ballot in the average U.S. House race, and 4.10 candidates on the ballot in the average presidential race.

The chart in the right column shows the percentage of signatures (or, in Delaware, the number of

registrants) for a new party or independent candidate for U.S. Senator or Governor to get on the November ballot. The easiest method in each state is used. "Easiest" means the procedure used most often. "Percentage" shows the number of signatures (or registrants, or votes in a primary) needed, divided by the number of registered voters. Washington is the worst, since candidates need approximately 30% support from the voters (measured by primary votes) in order to get on the November ballot. This is because the voters passed the "top-two" initiative last year.

# OF CANDIDATES ON	
Louisiana	9.50
New Jersey	8.71
New York	6.53
Minnesota	5.79
California	5.53
Vermont	5.50
Tennessee	5.36
Wisconsin	5.00
Colorado	4.80
Michigan	4.71
Illinois	4.40
Iowa	4.33
Utah	4.25

SIGNATURES NEEDED (%)	
Mississippi	.00%
Florida	.00%
Louisiana	.00%
Oklahoma	.00%
Vermont	.00+%
Tennessee	.00+%
New Jersey	.02%
Nevada	.02%
Colorado	.03%
Delaware	(reg.) .05%
Wisconsin	.05%
Ohio	.06%
Minnesota	.07%

Pennsylvania	4.13
Alaska	4.00
Nevada	4.00
Connecticut	3.80
Oregon	3.73
South Carolina	3.53
Rhode Island	3.50
Arizona	3.47
Hawaii	3.47
Missouri	3.44
Massachusetts	3.43
Kansas	3.40
Texas	3.36
Oklahoma	3.27
North Carolina	3.25
Maine	3.14
Delaware	3.13
Alabama	3.07
Indiana	3.06
New Hampshire	3.05
Ohio	3.00
Montana	2.87
Mississippi	2.80
South Dakota	2.73

Iowa	.08%
Utah	.08%
Hawaii	.10%
Idaho	.13%
New York	.13%
Rhode Island	.15%
Kentucky	.18%
Nebraska	.18%
North Dakota	.21%
Massachusetts	.24%
Missouri	.24%
Virginia	.24%
Kansas	.30%
Illinois	.33%
Maryland	.34%
New Hampshire	.35%
Texas	.35%
Connecticut	.37%
Maine	.42%
South Carolina	.43%
Michigan	.44%
Arkansas	.59%
Alaska	.66%
South Dakota	.67%

North Dakota	2.63
Idaho	2.60
West Virginia	2.60
Kentucky	2.56
Washington	2.50
Wyoming	2.50
Florida	2.47
Georgia	2.47
Nebraska	2.36
Virginia	2.36
Maryland	2.20
New Mexico	2.14
Arkansas	2.06

New Mexico	.68%
Indiana	.69%
West Virginia	.75%
Arizona	.76%
Montana	.78%
Pennsylvania	.80%
Oregon	.91%
California	1.00%
Georgia	1.00%
North Carolina	1.26%
Alabama	1.44%
Wyoming	2.05%
Washington	approx. 30.00%

EXHIBIT H

Supreme Court of the United States
Washington, D.C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 21, 1977

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 76-128 *Mandel v. Bradley*, No. 76-680, *Jernigan v. Lendall*

In 1974, Jim Lendall, an independent candidate for the state legislature, filed suit against the Arkansas Secretary of State, challenging Arkansas' ballot access requirements. At that time independent candidates were required to file nominating petitions signed by 15% of the qualified electors in the relevant district, and the petitions had to be submitted by the first Tuesday in April – roughly 210 days before the general election. A three-judge court ruled that the scheme was unconstitutional, specifically finding that support for independent candidates does not crystallize until after party nominees and positions are known, and that it is unduly burdensome to require so substantial a number of petition signatures to be filed so early. 387 F. Supp. 397 (ED Ark.). No appeal was taken.

The Arkansas legislature amended its ballot access scheme in 1975 to require signatures of only 10%, rather than 15% of the qualified electors in the district. According to a 1975 survey of state election laws, only one other state – North Carolina – requires that large a percentage of signatures. See Developments in the Law – Election Law, 88 Harv. L. Rev. 1111, 1124 n. 11 (1975).

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEOMCRATIC CENTRAL COMMITTEE, et al., Plaintiff Intervenors LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Intervenors v. DEAN LOGAN, King County Records & Elections Division Manager, et al., Defendants, STATE OF WASHINGTON, et al., Defendant Intervenors WASHINGTON STATE GRANGE, Defendant Intervenors.	NO. CV05-0927Z SUPPLEMENTAL DECLARATION OF JOHN J. WHITE, JR. NOTE ON MOTION CALENDAR: WEDNESDAY, JULY 13, 2005 WITH ORAL ARGUMENT

JOHN J. WHITE, JR. declares under penalty of perjury under the laws of the State of Washington and the United States of America as follows:

1. I am one of the attorneys for the plaintiffs in this lawsuit, am competent to testify, and make this declaration of my own personal knowledge.

2. Attached hereto as Exhibit 1 is a true and correct copy of a printout of an article dated June 12, 2005 and entitled "GOP picks its official primary candidates," published by The Seattle Times at http://seattletimes.nwsource.com.

3. Attached hereto as Exhibit 2 is a true and correct copy of a printout of the1996 election results for statewide partisan offices, published by The Seattle Times at http://seattletimes.nwsource.om/politics/results/primary/VOTE2.html.

4. Attached hereto as Exhibit 3 is a true and correct copy of a printout of an article dated October 12, 2004 and entitled "Locke, three ex-governors urge no vote on 'top two' primary initiative," published by The Seattle Post-Intelligencer at http://seattlepi.nwsource.com.

SIGNED this 17th day of June, 2005 in Kirkland, Washington.

John J. White Jr.

JOHN J. WHITE, JR.

EXHIBIT 1

The Seattle Times

GOP picks its official primary candidates

By Eric Pryne

Seattle Times staff reporter

Defiant King County Republicans, refusing to accept the state's new "top two" primary, convened in Bellevue yesterday and chose the candidates they contend will be the party's official nominees for county offices in September.

In the only close contest, Metropolitan King County Councilman-Steve Hammond, R-Enumclaw, outpolled fellow Councilman Reagan Dunn, R-Bellevue, in the new 9th Council District, 234 votes to 209. The two were thrown into the same district after voters by initiative last year downsized the council from 13 members to nine.

It's unclear, however, exactly what Hammond's victory means.

The state Republican Party, which says the top-two primary is unconstitutional, has asked a federal judge to rule that only the candidates chosen at yesterday's convention are legally entitled to be labeled Republicans on the September primary ballot.

The party also has asked losers to accept the convention's decision and not file for office in July.

In the weeks before the convention, both Hammond and Dunn said they intended to abide by its outcome. But after yesterday's vote, Dunn said he would file anyway, although he didn't know whether he would do so as a Republican.

"I can't abandon this campaign because of 24 votes in June," he said, referring to Hammond's victory margin (and getting his math slightly wrong).

Dunn said his earlier commitment to accept the convention's outcome was contingent on Hammond following the Republicans' so-called 11th Commandment—speak no ill of another Republican—and, he said, Hammond had broken that rule. Hammond backers had made "hit" phone calls to delegates Friday night, Dunn said, but he would provide no details.

Hammond denied fighting dirty: "I've had everything but the kitchen sink thrown at me." If he had lost, he said, he would have backed Dunn.

Democrats to convene

King County Democrats have scheduled a similar gathering later this month, but Secretary of State Sam Reed has said elections officials will pay no attention to the party conventions. Candidates, as before, are free to choose party labels when they file, without party approval, Reed has said.

But King County GOP Chairman Michael Young said yesterday that if Dunn files as a Republican, the state party will go to court to remove that label from the ballot.

Whatever the prize was at the GOP convention, Hammond and Dunn campaigned hard for it. This was retail politics in the extreme: The electorate consisted solely of 9th District precinct committee officers and delegates elected at caucuses May 17.

Roberta Yates, a precinct committee officer from Renton, said Dunn had come to her home to seek her

vote, and Hammond had phoned. She said she had received mail supporting one candidate or the other just about every other day for the past month.

The choice was between two conservatives who differed little on the issues.

"The bad news is that one will lose," Will Cummings, a precinct committee officer from Covington, said before the vote. "Many of us are rethinking the idea of reducing the size of the council."

Dunn, 34, appointed to the council in February, has more money—about $150,000 so far, compared with Hammond's $24,000—and the support of many GOP big names. He is the son of Jennifer Dunn, former U.S. representative and Republican power; other backers included former U.S. Sen. Slade Gorton and KVI-AM (570) talk-show host John Carlson.

Dunn argued he was more electable. He said the 9th is a swing district, and noted Hammond narrowly defeated a Democratic challenger two years ago.

Hammond, 51, a former minister, emphasized his experience and rural roots. Without him, he argued, rural southeast King County wouldn't have a representative on the council.

He attributed his win over the better-financed Dunn to grass-roots effort.

"There's just a little bit of a feeling of Rocky Balboa in me," Hammond said after the vote.

Conventions new this year

The major parties' unprecedented nominating conventions this year are the latest chapter in their long-running campaign to gain a larger voice in the state's primary elections.

Federal judges in 2003 struck down the venerable "blanket" primary. It allowed voters to pick candidates from any party; the top vote-getter from each party advanced to the November ballot. The parties challenged that system, arguing that it violated their First Amendment right of association because it allowed voters who weren't party members to participate in selecting a party's nominees.

State voters last fall overwhelmingly approved Initiative 872, creating a top-two primary in which the top two vote-getters advance to the general election, regardless of party. But the parties contend it has the same constitutional flaws as the blanket primary.

In the only other contested race yesterday, incumbent Pete von Reichbauer of Federal Way beat back a last-minute challenge from former state Rep. Phil Fortunato of Kent for the GOP nod in the 7th County Council District.

County Councilman David Irons, R-Sammamish, was the convention's choice to challenge County Executive Ron Sims, a Democrat.

The convention's other picks for County Council races were Steven Pyeatt in the 1st District, Brian Thomas in the 2nd, incumbent Kathy Lambert in the 3rd, Orin Wells in the 5th and incumbent Jane Hague in the 6th.

EXHIBIT 2

TRACKING THE CAMPAIGNS

ELECTION RESULTS

Please see note on the Table of Contents page for information on when we are posting and updating election returns.

*** — Incumbent**

√ — Candidate advances to Nov. 5 general election (no mark - too close to call; recount may decide it). Third-party candidates advance to the general election only if they attain at least 1 percent of the votes cast for the office in the primary.

Key to party affiliation: D (Democrat). I (Independent), L (Libertarian), NL (Natural Law), P (Populist), R (Republican), Re (Reform), SW (Socialist Workers)

| Congressional races | Statewide races | Legislative | Judicial | Seattle City Council | Ballot Measures |

Governor

DEMOCRATS

	Max Englerius, D	2,837	(0.2%)
	Jay Inslee, D	118,571	(10%)
√	Gary Locke, D	287,761	(24%)
	Norm Rice, D	212,886	(18%)
	Mohammad Said, D	3,007	(0.2%)
	Bryan Zetlen, D	6,152	(1%)

REPUBLICANS			
	Nona Brazier, R	21,237	(2%)
√	Ellen Craswell, R	185,680	(15%)
	Dale Foreman, R	62,612	(13%)
	Warren Hanson, R	4,886	(0.4%)
	Norm Maleng, R	109,088	(9%)
	Pam Roach, R	29,533	(2%)
	BobTharp,R	4,816	(0.4%)
	Jim Waldo, R	63,853	(0.5%)
Lieutenant Governor			
DEMOCRATS			
	Harvey Billmaier, D	13,613	(1%)
	Frank Gavaldon, D	32,638	(3%)
	Bambi Litchman, D	34,326	(3%)
	Bob Owen, D	44,510	(4%)
√	Brad Owen, D	242,756	(23%)
	Paull Shin, D	235,461	(22%)
REPUBLICANS			
√	Ann Anderson, R	207,725	(19%)
	Bruce Buckles, R	19,951	(2%)
	Gerald Goodloe, R	50,771	(5%)
	Ed Torres, R	58,802	(6%)
	Jim West, R	96,979	(9%)
OTHER PARTIES			
	Michael Hackett. NL	8,945	(1%)
√	Shawn Newman. Re	10,774	(1%)
√	Art Rathjen, L	11,902	(1%)

Attorney General			
√	C. Gregoire, D*	640,029	(57%)
√	Richard Pope, R	415,188	(37%)
√	L. Coachman, NL	24,031	(2%)
√	Richard Shepart, L	37,314	(3%)
Commissioner of Public Lands			
√	J. Belcher, D*	567,007	(53%)
	Randy Boss, R	69,538	(7%)
√	Bruce Mackey, R	291,694	(27%)
	Patrick Parrish, R	108,877	(10%)
√	Marc Strauch, NL	25,527	(2%)
Secretary of State			
√	Ralph Munro, R*	643,622	(60%)
√	Phyllis Kenney, D	388,405	(36%)
√	Gary Gill, NL	33,571	(3%)
State Auditor			
√	Brian Sonntag, D*	603,662	(57%)
	Nina Becker, R	192,855	(18%)
√	Robert Keene Jr., R	199,721	(19%)
	Mike The Mover	66,429	(6%)
State Treasurer			
	Jack Kiley, D	156,904	(15%)
√	Mike Murphy, D	382,262	(37%)
	Randolph Bell, R	201,220	(20%)
√	Lucy DeYoung,R	288,856	(28%)

Superintendent of Public Instruction			
√	Teresa Bergeson	379,544	(38%)
	O. Jerome Brown	32,127	(3%)
	Raul de la Rosa	37,646	(4%)
	Richard Fuller	47,444	(5%)
	N. Hidden-Dodson	53,969	(5%)
	Gloria Johannessen	43,736	(4%)
	Earl LaBerge	14,540	(2%)
	Dan Leahy	68,994	(7%)
	Mae Lovern	18,019	(2%)
√	Ron Taber	174,988	(18%)
	Chris Vance	119,644	(12%)

Insurance Commissioner			
DEMOCRATS			
√	Deborah Senn, D*	571,165	(54%)
REPUBLICANS			
	Garland Connor, R	23,769	(2%)
√	Anthony Lowe, R	173,610	(16%
	Brian McCullock, R	124,513	(12%
	Steve Skipper, R	63,470	(6%)
	Dave Walker, R	77,571	(7%)
OTHER PARTIES			
√	Steve Seveick, NL	23,554	(2%)

EXHIBIT 3

Locke, three ex-governors urge no vote on 'top two" primary initiative

(http://seattlepi.nwsource.com/local/194794_primary12.html)

Tuesday, October 12, 2004

By NEIL MODIE

SEATTLE POST-INTELLIGENCER REPORTER

Opponents of Initiative 872 trotted out a bipartisan array featuring Gov. Gary Locke and three former governors yesterday in a political name-dropping battle over an effort to give Washington a Louisiana-style primary election system.

"It fundamentally will limit the choices the voters will have in the election in November" if voters pass I-872, Locke warned. The initiative, on the Nov. 2 ballot, would create a "top two," or "qualifying," primary system that sends the two highest primary vote-getters into the general election even if both belong to the same party.

Locke and former Govs. Mike Lowry and Booth Gardner, all Democrats, and John Spellman, a Republican, have sided with Democratic, Republican and Libertarian party leaders against the initiative. All but Gardner attended a Seattle news conference to denounce it.

The Yes on I-872 campaign, sponsored by the Washington State Grange, to replace the state's new, separate-party primary, also has its share of big political backers, including former Gov. Dan Evans, former Sen. Slade Gorton and Secretary of State Sam Reed, all Republicans, and Lt. Gov. Brad Owen, a Democrat.

The only living former governor not recruited by either side is Albert Rosellini, a Democrat, who had a role in a Seattle City Council campaign finance scandal that is the subject of a criminal investigation by the King County Prosecutor's Office.

Proponents expect voter resentment of the loss of the popular former "blanket primary" to help pass I-872. The blanket primary let voters cross party lines on the primary ballot. But the state Democratic, Republican and Libertarian parties sued successfully in federal court to have it declared unconstitutional.

The "top two" primary would vaguely resemble the blanket primary in allowing voters to cross party lines. But by limiting the general-election ballot to two nominees for each office, Locke said, it almost always would keep third-party candidates -- and occasionally even major-party candidates -- off the November ballot.

And it "will in no way bring back the blanket primary," Lowry said.

"It's a skewed system," Spellman said, adding, "Everyone thinks of this as a panacea. It ain't. It's worse" than either the blanket primary or the current system, which requires a voter to choose only one party's primary ballot but doesn't keep a record of which one is chosen.

State party leaders have threatened to select party nominees at party conventions if I-872 passes. Spellman said the initiative makes no provision for allowing convention-chosen nominees onto the

November ballot "unless (the parties) went to court, and that would be chaotic."

Evans, however, predicted in an interview later that if the initiative fails, the parties "will be back again to try to gain more control. They next will want to close the primaries to only those who declare themselves Republicans and Democrats" even though they deny intending to do so.

Noting Washington's tradition of political independence and moderation, Evans said, "The states that have the most closed primaries are invariably the states that pick the more liberal Democrats and the more conservative Republicans. They leave out the more productive middle, and as such I think they end up with poorer office holders and not so good government."

Spellman said he wouldn't have been elected under a "top two" system because two Democrats outpolled him in the 1980 primary even though he went on to win the general election. And in the 1996 gubernatorial primary that Locke won, he and fellow Democrat Norm Rice would have been on the November ballot if the "top two" primary had been law.

In heavily Democratic parts of Seattle or heavily Republican parts of Eastern Washington, Locke said, general-election voters would be deprived of the other party's point or view, and usually the minor parties' points of view as well.

However, a Yes on I-872 campaign worker passed out material at the opponents' news conference, noting that if Washington had a "top two" system,

four minor-party candidates in 2002 and 13 minor-party candidates in 2000 would have qualified for the general-election ballot in state legislative races.

It contradicts arguments of initiative opponents "who have irresponsibly stated that I-872 will shut out minor parties," the Yes on I-872 committee said in a prepared statement. However, in the 17 races the proponents cited, there would have been either no Republican or no Democrat on the November ballot.

"The truth is that minor party candidates have just as good of a chance of succeeding under a qualifying primary as anyone else," said Don Whiting, a former state elections supervisor and an I-872 leader.

Louisiana, with its "Cajun primary," is the only state that allows two candidates of the same party to appear on the general-election ballot. Washington's system, adopted this year, is identical to that of nine other states. Thirty-nine other states have "closed" primaries, requiring voters to publicly declare a party affiliation.

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The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff Intervenors

v.

DEAN LOGAN, King County Records & Elections Division Manager, et al.,

STATE OF WASHINGTON, et al.,

Defendant Intervenors

WASHINGTON STATE GRANGE,

Defendant Intervenors.

NO. 05-0927-Z

STATE'S RESPONSE TO MOTIONS OF REPUBLICAN, LIBERTARIAN, AND DEMOCRATIC PARTIES FOR SUMMARY JUDGMENT, AND STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT

STATE'S MOTION TO STRIKE REPUBLICAN PARTY'S SUPPLEMENT TO MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: WEDNESDAY, JULY 13, 2005

WITH ORAL ARGUMENT

* * *

[12]

V. ARGUMENT

A. Discussion Of Agreed Statement Of Issues

1. The primary system established by Initiative 872 does not nominate political party candidates for public office.

By enacting I-872, Washington voters separated the public process of electing candidates to public office from the private process by which political parties select their nominees. This essential change in public policy is the most basic characteristic of I-872, representing a fundamental change in the nature of primaries in Washington's electoral system. In making this change, the voters made their decision to select one of two basic approaches to conducting primary elections left open to states in the wake of *California Democratic Party v. Jones* as followed by the United States Court of Appeals for the Ninth Circuit in *Democratic Party of Washington v. Reed*. Following the results of that litigation, Washington voters could choose either to keep the Montana primary, in which the candidates appearing on the general election ballot would be determined through a party nominating primary (in which only voters selecting a particular party's ballot would be allowed to participate in selecting that party's candidates), or to adopt a new primary in which all the voters would choose among all candidates, with party nominations made irrelevant

to qualifying candidates to the ballot. The voters overwhelming selected the latter.

a. Washington's blanket primary combined voter choice with the guarantee that one candidate of each major party would advance to the general election.

As noted above, from 1935 until recently, Washington used a system known colloquially as the "blanket primary." Laws of 1935, ch. 26 (Initiative Measure to the Legislature No. 2). The blanket primary consisted of two essential features: (1) The names of all candidates, of every political party, appeared together on the primary ballot, and all

[13]

voters were permitted to select from among all candidates without any limitation based upon party affiliation of either the candidate or the voter; but (2) based on the results of the election, one candidate of each major political party (and any minor party candidates who qualified) would advance to the general election. Laws of 1935 ch. 26, § 3 (most recently codified as RCW 29A.52.130) (all properly registered voters may select among all candidates for each office); RCW 29A.36.190 (describing which candidates advanced to the general election). That is, one Democrat and one Republican (and one candidate of any other party that may have qualified as a major party at any given time) would be guaranteed a spot on the general election ballot, without regard to the relative level of support earned by each individual candidate.

In a decision applied to Washington by a subsequent Ninth Circuit opinion, the United States Supreme Court determined that states may not combine those two features, but may choose between them. *Cal. Demo.*, 530 U.S. 567. That is, states may either permit all voters to choose from among all candidates at the primary, or the state may choose to use primaries as a method of nominating candidates for public office and then place those nominees on the general election ballot. Washington's voters, through I-872, chose the first option, thereby deciding to elect their public officials without using party nominations as a means of determining which candidates will appear on the general election ballot.

The United States Supreme Court made clear the choice between these two distinctly different approaches to primaries when it struck down California's version of the blanket primary. *Id.* The Court premised its analysis upon the determination that California's blanket primary was used to select party nominees, since the primary method by which a candidate would qualify to appear on the general election ballot was by winning a party primary. *Id.* at 569-70.[10] The Court recognized that "States have a major role to play in

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[10] The other method was to qualify as an independent through a petition process. *Cal. Demo.* 530 U.S. at 569-70.

structuring and monitoring the election process, including primaries,"[11] that it is "'too plain for argument,' . . . that a State may require parties to use the primary format for selecting their nominees,

in order to assure that intraparty competition is resolved in a democratic fashion." *Id.* at 572 (quoting *Am. Party of Tex. v. White*, 415 U.S. 767, 781, 94 S. Ct. 1296, 39 L. Ed. 2d 744 (1974) (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 237, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986) (Scalia, J., dissenting)). But where the process for selecting party nominees included permitting every voter to select among all candidates, as under the blanket primary, the Court found a violation of the parties' associational rights. *Cal. Demo.*, 530 U.S. at 577.

The Court then spelled out an alternative approach, which alternative Washington voters ultimately selected through I-872. The Court observed that a state could permit all voters to select from among all candidates at the primary in the following manner:

> Respondents could protect them all [referring to state interests] by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot—which may include nomination by established [political] parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate and the top two vote getters (or however many the State prescribes) then move on to the general election.

Id. at 585 (emphasis by the Court). The Court then explained, "This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: *Primary voters are not choosing a party's nominee.*" *Id.* at 585-86 (emphasis added).

The Ninth Circuit determined that Washington's blanket primary, like California's, was used to select political party nominees. *Wash. Demo.*, 343 F.3d at 1203-04. The Court reasoned that distinctions between California's system and Washington's were immaterial,

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[11] *Cal. Demo.*, 530 U.S. at 572 (citing *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed.2d 245 (1992), *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986)).

[15]

rejecting the argument that Washington did not use the blanket primary to select party nominees. *Id.*[12]

The gist of the holdings in *Cal. Demo.* and *Wash. Demo.* is therefore that, even though states possess broad authority over the electoral process,[13] states cannot combine two features in the same primary system. That is, they cannot simultaneously use the primary to select party nominees and permit all voters to choose from among all candidates at the primary; the states must choose one approach or the other.

b. Forced to choose between preserving voter choice and using primaries to nominate party candidates, Washington voters chose to preserve voter choice.

At the 2004 general election, Washington voters selected an approach that preserved maximum voter choice rather than interparty competition in the general election. The language of I-872 makes this choice clear in several respects. The voters, through the Initiative, explained the new and fundamentally different nature of the primary established by I-872: "A primary is a first stage in the public process by which voters elect candidates to public office." I-872, § 7(1). The voters determined that the primary would no longer constitute a mechanism for the selection of party nominees, but rather it would be transformed into a "first stage" in electing candidates for office. The voters changed the statutory definition of "primary" to reflect this fundamental shift in its purpose:

> "Primary" or "primary election" means a ((~~statutory~~)) procedure for ((~~nominating~~)) winnowing candidates ((~~to~~)) for public office ((~~at the polls~~)) to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office without limitation based on party preference or affiliation, of either the voter or the candidate.

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[12] The Ninth Circuit noted the language in *Cal. Demo.* referring to a "nonpartisan blanket primary" in which "voters can vote for anyone on the primary ballot, and then the top vote-getters regardless of party run against each other in the general election. *Wash. Demo.* 343 F.3d at 1203. The guarantee of one place on the general election ballot for each political party is, indeed, the key distinction between a party nominating primary and a "nonpartisan blanket primary," which led the Ninth Circuit to conclude that Washington's prior system used the primary to select party nominees. *Id.*

[13] *Cal. Demo.*, 530 U.S. at 569-70.

[16]

I-872, § 5 (amending RCW 29A.04.127; deletions of prior statutory language shown in strikeout; additions of language underlined). To complete the transition away from a system in which party nominations determined access to the general election ballot, the voters also provided, "For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot". I-872, § 6(1). I-872 supplants the prior rule that the candidate receiving the highest number of votes of each party—the party nominee—would advance. I-872, § 17(4) (repealing RCW 29A.36.190).[14] The Secretary of State reiterated this point in an administrative rule that captures the understanding of the state's chief election officer as to the nature of the new primary: "Pursuant to chapter 2, Laws of 2005 [I-872], a partisan primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election." WAC 434-262-012 (reproduced in Decl. of James K. Pharris, Ex. C).

Finally, the voters made clear their objective of promoting voter choice over party nominations, through policy statements set forth in the initiative. The initiative's intent section clearly addresses the concern of "protect[ing] each voter's right to vote for any candidate for any office." I-872, § 2. "[T]his People's Choice Initiative will become effective to implement a system that best protects the rights of voters to make such choices, increases voter participation, and advances compelling interests of the state of Washington." *Id.* Among the interests the Initiative advances was the protection of several voter rights,

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[14] I-872 was drafted before the enactment of the 2004 Legislation that resulted in the Montana Primary. Accordingly, it did not repeal RCW 29A.36.191, a provision of the 2004 Act. As the later-enacted statute, however, I-872 supersedes the earlier provision of RCW 29A.36.191. *ASARCO, Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 708, 601 P.2d 501 (1979) (setting forth the standard for the implied repeal of a statute when "'(1) the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede prior legislation on the subject; or (2) the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot be reconciled and both given effect by a fair and reasonable construction'").

In addition, the Voters Pamphlet statement in favor of I-872 makes clear that the elimination of a guarantee of one Democrat and one Republican on the general election ballot—of, in other words, party nominations—was one of the major objectives of the Initiative. "No political party is guaranteed a spot on the general election ballot." Statement for Initiative 872, Voters Pamphlet 12 (2004), attached as Ex. A to James K. Pharris Declaration.

[17]

including, "The right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate." I-872, § 3(3).

c. Under Initiative 872, parties choose their own nominees; the primary is not used for this purpose.

The elimination of Washington's traditional blanket primary forced Washington voters to choose between two strikingly different visions of a primary. The voters were forced to choose between voter choice and party nominations, and chose voter choice.

The Supreme Court's decision in *Cal. Demo.* made it clear that states need not structure their electoral process around party nominations and party primaries. Clearly if a state chooses to utilize a party nomination system to qualify candidates for the general election ballot, the state may require that the nominees be selected by primary as a way of assuring that intraparty disputes are resolved in a democratic manner. If the State chooses such a system, then it must respect the associational rights of the parties that such a system implicates. *Cal. Demo.*, 530 U.S. at 572. The State need not structure ballot access around party nominations, however. As an alternative, the Court offered the option that the voters selected when they enacted I-872: that the State completely decouple the process for deciding which candidates appear on the general election

ballot from any party nominating process. *Id.* at 585-86 (quoted above at p. 14).

The political parties read a requirement that is not there into this portion of the *Cal. Demo.* case. The political parties postulate that the option of a qualifying primary suggested by the Court is limited to a system in which the political parties first nominate their candidates, and then only those nominees are permitted access to the primary ballot. Republican Mot. at 12; Democratic Mot. at 16-17. Very much the contrary, the Court

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[15] The political parties also attempt to minimize the significance of this part of the Supreme Court's decision by characterizing it as dicta. The passage at issue, however, formed a key portion of the Court's substantive analysis by explaining why, in the Court's view, California's blanket primary was not narrowly tailored to the interests the state argued that it advanced. *Cal. Demo.*, 530 U.S. at 585. Even if its characterization as dicta was correct, it would not follow that lower courts should ignore this analysis. *Gen.*

[18]

states that separate party nominating processes might be used for determining candidate ballot access. It did not state that such a process was a mandatory element in a "nonpartisan" primary system. The Court used the permissive word "may" in stating that a primary "*may* include nomination by established parties". *Cal. Demo.*, 530 U.S. at 585. It seems clear that if the Court had intended to describe a mandatory requirement that it would have used mandatory, rather than permissive, language.

The political parties put much stock in the dissenting opinion of Justice Stevens in this regard, assuming that the Court's majority silently adopted an assumption that appears in a footnote to that dissent. Justice Stevens described a "nonpartisan primary" as, "a system presently used in Louisiana—in which candidates previously nominated by the various political parties and independent candidates compete." *Id.* at 598 n.8 (Stevens, J., dissenting). Their reliance upon the dissent is incorrect for several reasons. Most obviously, the description by Justice Stevens occurs in a dissent. A dissenting opinion does not speak for the Court. Further, to the extent that the dissenting opinion assumes that party nominees *would*, rather than merely *could*, be part of the system, there is no indication the Court's majority shared the assumption, since the opinion of the Court used permissive language. Next, although Justice Stevens described Louisiana's system as including a party nominating process, Louisiana law does not provide for party nominations separate from the primary. *See* La. Rev. State. Ann. § 18:461 (setting forth the manner in which candidates qualify to the primary ballot); La. Rev. State. Ann. § 18:465 (describing nominating petition). Finally, in context, Justice Stevens' argument is more of a warning against another argument that the political parties have advanced, not an embrace of their view that the opinion requires a party nominating process in order for a "top two" primary to be valid. The quoted language comes immediately after a sentence in which Justice Stevens warns against a "slippery slope"

Elec. Co. v. Joiner, 522 U.S. 136, 151 n.2, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) (Stevens, J., concurring in part and dissenting in part).

[19]

approach to reviewing state primary systems. He warns against concluding that, "the only nominating options open for the States to choose without party consent are: (1) not to have primary elections; or (2) to have what the Court calls a 'nonpartisan primary'". *Cal. Demo.*, 530 U.S. at 598 n.8. Justice Stevens opposed the notion that the parties could simply "order up" the form of primary they prefer as if the state were a short order cook. *Id.* In context, it makes little sense to read the dissent as requiring precisely what Justice Stevens warned against—the authority of the parties to dictate the process despite the provisions of state law.

Under I-872's approach of using a "qualifying primary" rather than a "nominating primary," party nominations are irrelevant to the process of deciding which candidates appear on the general election ballot. The candidates who appear on the general election ballot are selected by the *voters at large*, not by the parties or by the voters as party members. The top two candidates, without regard to party affiliation, advance to the general election. I-872, § 6(1); *see also*, I-872, § 7. Since party affiliation plays no role in determining which candidates advance to the general election, the primary established by this Initiative cannot in any way be regarded as determining party nominees.[16]

The political parties make much of the fact that a candidate's party preference appears on the ballot, but this feature falls far short of making I-872's primary a device for selecting party nominees. The Initiative requires the declaration of candidacy form to include a space in which candidates for partisan office may "indicate his or her major or minor party preference, or independent status." I-872, § 9(3) (amending RCW 29A.24.030). Under I-872, this statement of party preference plays no role in determining which candidates

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[16] The Democratic Party suggests that candidates selected under the new top two primary will be "political party candidates" because RCW 29A.52.116 states that "[m]ajor political party candidates for all partisan elected offices . . . must be nominated at primaries held under this chapter." Democratic Mot. at 15. RCW 29A.52.116 was enacted in 2004 as a part of the Montana primary system, which clearly was a party nominating system. The quoted language is clearly inconsistent with the system established in I-872, and should be regarded as obsolete. RCW 42.17.510(1), requiring sponsors of public advertising concerning a candidate to clearly identify the candidate's political party, also dates back well before the enactment of I-872. This statute is still enforceable because it is not directly contradictory to I-872, but neither can it serve as evidence that candidates are "nominees" of political parties.

[20]

advance to the general election. The candidates with the two highest vote totals will qualify for the general election, without reference to party preference. The optional statement of political preference is provided solely to the voters as one possibly relevant piece of information about the candidate. A statement by the *candidate* as to his or

her own preferences, provided as information to the voters, does not equate with a statement that the candidate has been nominated, endorsed, or supported by any political party, and no reasonable voter would believe otherwise.

Moreover, nothing prevents political parties from nominating candidates. They may certainly do so if they choose. But what the political parties seek, and what the State need not afford them, is a right to gain a place on the general election ballot for their nominees. They can point to no authority establishing that political party nominations *must*, as opposed to merely *may*, be used to determine which candidates appear on the general election ballot. Indeed, case law clearly establishes that while political parties have a right to a reasonable opportunity for their candidates to appear on the general election ballot, they have no absolute right for them to actually do so. *Munro v. Socialist Workers Party*, 479 U.S. at 193 (states may condition general election ballot access upon a showing of a modicum of public support). "We think that the State can properly reserve the general election ballot 'for major struggles,' . . . by conditioning access to that ballot on a showing of a modicum of voter support." *Id.* at 196 (quoting *Storer v. Brown*, 415 U.S. 724, 735, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)).

Washington's voters have clearly decided that the "major struggles" to reserve for the general election ballot are those between the two candidates garnering the strongest support, regardless of party, rather than among those candidates nominated by political parties. So long as the system provides a

reasonable opportunity to the political parties through which their candidates can enter the competition for voter support, their rights are held intact.

* * *

[24]

Assume further that the Republican Party has, by a convention or some other internal process, selected Candidate C as its preferred candidate for the office, while the Democratic Party has endorsed Candidate E. Through the internal process each party has selected, the "right to nominate" of each party has been fully satisfied. Washington law in no way limits or burdens the right of any party to use such processes. In the primary, Candidate C could be described as the "nominee" of the Republican Party and Candidate E as the "nominee" of the Democratic Party, because the parties have so declared (with no interference or involvement by the State). Party nominee status may certainly affect the politics of the campaign, but it plays no part in the way the ballot is constructed, or in the way the election is conducted.

Suppose the top two vote-getters in the primary are A and B, both Independent candidates, so that these two candidates will appear on the general election ballot. Does this situation violate the "rights" of the Republican and Democratic parties to have their "nominees" on the ballot? No, they have fully exercised their "nomination" right, and may continue to exercise their rights of free speech and freedom of assembly in the general

election, by supporting A or B or by devoting their energies to other offices.

In the alternative, suppose the top two vote-getters in the primary are C and D, both of whom have stated a party preference of "Republican." Are C and D *both* "Republican nominees" in the general election? No, unless the party chooses to make them so. The situation is precisely the same as it would be if two well-known Republicans were the finalists for a non-partisan office, such as state superintendent of public instruction or mayor of a city. The situation is politically interesting, both for Republicans and for Democrats (who have no standard bearer in such an election), but this does not make it unconstitutional.

Even if the two finalists are C and E, a Republican and a Democrat, both favored by their parties, they are the "nominees" of the parties because the parties made them so, not because they won the primary and advanced to the general election. The system is open to full participation by all parties, and all parties are legally treated exactly the same.

[25]

Thus, it is hard to imagine that a "top two" system must, as a matter of constitutional law, accommodate the asserted "right," for instance, of the Republicans in the hypothetical case above, to select Candidate C for the office in question *and to exclude Candidate D from the primary ballot, or at least to force D to choose a party preference other than Republican*. If C and D are in fact preferred by the Republican Party, do they not both have the right to say so publicly, and to have this fact published in an

open public forum such as the ballot or the voters' pamphlet? The give-and-take of the campaign provides ample opportunity for each political party to express its preference, if it chooses to do so.

The model of the nonpartisan primary shows that states need not organize their elections around party nominations. Yet, the political parties here suggest that even the faintest whiff of state recognition of the party preference of candidates triggers the parties' right to commandeer the election process and reduce the State's general election to a choice among candidates selected by the parties. None of the authorities they cite support such a view.

3. If the primary system under Initiative 872 nominates political party candidates for public office, Initiative 872 does not violate the First Amendment by compelling a political party to associate with unaffiliated voters and members of other political parties in the selection of its nominees.

The short answer to Issue No. 3, of course, is that it is based upon an incorrect premise: I-872 does not, in fact, nominate political party candidates for public office, as discussed above. However, if the Court found that the existence of a candidate's option to express a political party preference on the ballot, no matter how tangential to the operation of the election system, were sufficient to render the "top two" primary a party nomination system, that would indeed trigger a need to respect the associational interests of the political parties.[19]

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[19] It would not necessarily follow that I-872 is unconstitutional in its entirety, of course, as discussed below.

* * *

[34]

* * *

In this case the portions of Initiative 872 that appears to draw the most fire are Sections 7 and 9, the provisions that permit candidates to declare their "political party preference" and provide that this information will appear on the ballot. While the State believes these provisions are well within the State's constitutional authority, a "top two" primary could still be conducted even if it were found necessary to limit the extent to which some or all candidates could state their "political party preference."

The language of the Initiative itself confirms that the voters' primary purpose in enacting Initiative 872 was to allow "the broadest possible participation in the primary election" (I-872, Section 2, quoting from *Heavey v. Chapman*, 93 Wn.2d 700, 705, 611 P.2d 1256 (1980)) and to preserve the "right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation." I-872, § 3(3). If the Court were to find that some other detail of the statute causes constitutional problems, the Court should allow the State to adjust the specific problem found while maintaining the basic machinery of the "top two" primary. Any other result would force an unwanted

election system on Washington's voters beyond any constitutional necessity to do so.

* * *

The Honorable THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Intervenors LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Intervenors v. DEAN LOGAN, King County Records & Elections Division Manager, et al., STATE OF WASHINGTON, et al., Defendant Intervenors WASHINGTON STATE GRANGE, Defendant Intervenors.	NO. 05-0927-Z DECLARATION OF JAMES K. PHARRIS IN SUPPORT OF STATE'S RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT NOTE ON MOTION CALENDAR: WEDNESDAY, JULY 13, 2005 WITH ORAL ARGUMENT

I, James K. Pharris, being first duly sworn upon oath, declare as follows:

1. I am over eighteen years of age and competent to testify. I am an attorney licensed to practice law in the state of Washington and admitted to the bar of this Court. I am currently employed as

a Senior Assistant Attorney General for the state of Washington. I am one of the counsel for Defendant-Intervenors State of Washington, Secretary of State Sam Reed, and Attorney General Rob McKenna in this action.

2. Attached to this declaration are true and correct copies of the following documents:

a. Exhibit A is a true and correct copy of the pages relating to Initiative 872 from the official Voters Pamphlet, published by the Secretary of State for the 2004 general election;

b. Exhibit B is a true and correct copy of Laws of 2004, ch. 271, as enacted by the 2004 Legislature and as partially vetoed by the Governor; and

c. Exhibit C is a true and correct copy of a Rule-Making Order, filed by the Secretary of State with the Washington State Code Reviser's Office on May 18, 2005, implementing provisions of Initiative 872.

3. I swear under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct and of my own knowledge, and that I executed this declaration at Olympia, Washington, in the County of Thurston, this 1st day of July, 2005.

James K. Pharris

James K. Pharris

EXHIBIT A

State of Washington

Voters' Pamphlet

[cover picture]

Published by the Office of the Secretary of State

Edition 16

* * *

[10]

INITIATIVE MEASURE 872

PROPOSED TO THE PEOPLE

Official Ballot Title:

Initiative Measure 872 concerns elections for partisan offices.

This measure would allow voters to select among all candidates in a primary. Ballots would indicate candidates' party preference. The two candidates receiving most votes advance to the general election, regardless of party.

Should this measure be enacted into law?

Yes [ ] No [ ]

Note: The ballot title and explanatory statement were written by the Attorney General as required by law. The Fiscal Impact Statement was written by the Office of Financial Management. For more in-depth Office of Financial Management analysis, visit www.ofm.wa.gov/initiatives/default.htm. The complete text of Initiative Measure 872 begins on page 27.

Fiscal Impact Statement:

Summary of Fiscal Impact

Initiative 872 would authorize a primary election allowing the two candidates with the most votes to advance to the general election, regardless of

political party, starting with the primary election in September 2005. Annual costs for this primary election system could be as much as $6.0 million lower for the state and counties compared to current law. The lower cost of the primary election system is due to ballot size, the number of ballots, and associated processing procedures. One time costs for public education and voter notification of changes in the primary election system may cost the state $1.3 million.

Assumptions for Analysis of I-872

- As the State Elections Officer, the Secretary of State is projected to spend up to $1.3 million on one-time costs associated with implementing the new primary system. The most notable one-time cost is a voter outreach campaign to educate voters about changed requirements. The Secretary of State's Office is expected to spend up to $1 million to conduct a media campaign and up to $305,000 to publish an eight-page primary voter's pamphlet prior to the primary election in September that explains the primary system changes to voters. Other state one-time costs associated with implementing a new primary are as follows: developing new election processes/procedures; designing a new ballot; and training election and poll-site staff on new processes. The Secretary of State's Office estimates that they would spend up to $25,000 dollars on these activities.
- County auditors, who administer elections at the county level, are expected to save up to $6

million annually for on-going costs associated with implementation of the new primary election system. The state, which reimburses the counties for odd-year primary election costs, would share this cost savings. The current system requires either multiple ballots or a larger consolidated ballot that enables voters to either vote by party for all offices or vote only for non-partisan offices. The new primary election system reduces ballot publishing and processing costs.

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[11]

INITIATIVE MEASURE 872

Explanatory Statement:

The law as it presently exists:

The process for electing candidates to federal, state and local offices involves both a primary and a general election. The primary, which is conducted in September, plays a major role in determining which candidates appear on the ballot for the following general election. The general election takes place in November, and is the voters' opportunity to select which of the candidates who appear on the general election ballot (or a write-in) should be elected to office.

The current system, described below, applies to "partisan" offices, which are offices to which candidates are elected using a party affiliation. They include United States Senator, members of Congress, most statewide elected offices (Governor, Lieutenant

Governor, Secretary of State, Treasurer, Auditor, Attorney General, Commissioner of Public Lands, and Insurance Commissioner), the state legislature, and most county offices. "Nonpartisan" offices are elected without reference to political party, and include judges (at all levels), the Superintendent of Public Instruction, offices of cities and special districts, and county offices where provided by local charter. Elections for nonpartisan offices are conducted differently from the system described below, and are not affected by the proposed initiative. Elections for President and Vice President of the United States are also not affected by the proposed initiative.

The way in which primaries are currently conducted is the product of longstanding Washington law, a recent lawsuit, and new 2004 legislation. Before it was declared unconstitutional by the courts in 2003, Washington used a system that was commonly known as the "blanket primary." Under that system, all candidates for a particular partisan office appeared together on the primary ballot, and a voter could vote for a candidate of one party for one office and a candidate of another party for a different office. The top vote getter of each major political party (currently meaning the Republicans, Democrats, and Libertarians) then advanced to the general election. Minor party and independent candidates could also advance to the general election if they received at least 1% of the votes for that office. The general election ballot, therefore, included the top candidate of each major party and some minor party or independent candidates as well.

In late 2003, a federal court ruled that the blanket primary was unconstitutional. All appeals in that case have been exhausted and the result is final. This means that a court order prohibits Washington from continuing to use the blanket primary system used in the past.

In response to this court decision, a new law was enacted in 2004 establishing a different way of conducting primaries for partisan offices. This new system applied for the first time at the September 2004 primary. Under the new system, separate primary contests are conducted for each major political party. In order to vote for partisan offices, a voter selects a primary ballot of a particular political party. Voters do not register by party and no record is made of the voters' choice. In the primary, the voter is limited to choosing among the candidates of the party whose ballot he or she selects, and may not vote for candidates affiliated with any other party. Nonpartisan offices and ballot measures appear separately, and a voter may cast votes for those offices and measures regardless of whether the voter cast votes for partisan offices.

The system adopted for use beginning in 2004 does not change the way voters participate in the general election conducted in November of each year. The general election ballot includes the candidate of each major political party who received the most votes at the primary, as well as any minor party or independent candidates who qualify through a convention and petition process. Voters are not limited to a single party at the general election. At the general election voters may choose among candidates of each major political party, as well as

any minor party or independent candidates who qualify.

The effect of the proposed measure, if it becomes law:

This measure would change the system used for conducting primaries and general elections for partisan offices. The initiative would replace the system of separate primaries for each party, as adopted and used for the first time in 2004, with a system in which all candidates for each partisan office would appear together on the primary ballot. Candidates would be permitted to express a party preference or declare themselves independents, and their preference or status would appear on the ballot. The primary ballot would include all candidates filing for the office, including both major party and minor party candidates and independents. Voters would be permitted to vote for any candidate for any office, and would not be limited to a single party.

The general election ballot would be limited to the two candidates who receive the most votes for each office at the primary, whether they are of the same or different political preference. The measure would replace existing provisions that candidates of each major political party, as well as any minor party or independent candidates who qualify, appear on the general election ballot. This measure would change the way that candidates qualify to appear on the general election ballot, but would not otherwise change the way general elections are conducted. This measure would not change the way that primaries or general elections are conducted for nonpartisan offices.

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[12]

Statement For Initiative Measure 872

VOTE FOR THE PERSON — NOT THE PARTY

Last year the state party bosses won their lawsuit against the blanket primary, and in 2004 they convinced the Governor to veto legislation allowing voters to continue to vote for any candidate in the primary. Most of us believe this freedom to select any candidate in the primary is a basic right. Don't be forced to choose from only one party's slate of candidates in the primary. *Vote Yes on I-872.*

MORE COMPETITIVE PRIMARIES AND GENERAL ELECTIONS

Under I-872, the two candidates with the most votes in the primary win and go on to the general election ballot. No political party is guaranteed a spot on the general election ballot. Parties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters. That's fair – and that's right.

PROTECT PRIVACY AND INCREASE PARTICIPATION

Under I-872, you will never have to declare party or register by party in order to vote in the primary. In the primaries in 2000, the turnout in Washington was *more than twice as high* as in states with party primaries – because voters in this state could support any candidate on the primary ballot. *Vote Yes on I-872.*

RETURN CONTROL OF THE PRIMARY TO THE VOTERS

The September primary this year gave the state party bosses more control over who appears on our general election ballot at the expense of the average voter. I-872 will restore the kind of choice in the primary that voters enjoyed for seventy years with the blanket primary. Protect Washington's tradition as a state that elects people over party labels. *Vote Yes on I-872.*

For more information, call 1.800.854.1635 or visit www.i872.org .

Rebuttal of Statement Against

I-872 gives voters *more choices* in the primary and *better choices* in the general. *All the voters* will decide who is on the November ballot. Whether it's one Republican and one Democrat, one major and one minor party, or even an Independent — they will be *the candidates the voters want the most.* The primary and general election should be decided by voters, not by exclusive party organizations that might be dominated by special interests!

Voters' Pamphlet Argument Prepared by:

TERRY HUNT, President, Washington State Grange; BILL FINKBEINER, State Senator, Republican; BRIAN HATFIELD, State Representative, Democrat; SAM REED, Secretary of State, Republican; JOHN STANTON, Chairman and CEO, Western Wireless; DARLENE FAIRLEY, State Senator, Democrat.

Statement Against Initiative Measure 872

I-872 REDUCES YOUR ELECTION CHOICES THE LEAGUE OF WOMEN VOTERS AND OTHER CONCERNED CITIZENS URGE YOU TO MAKE SURE WASHINGTON VOTERS HAVE CHOICES IN NOVEMBER

Vote No on I-872! Don't be fooled. I-872 creates a Louisiana-style primary that would sharply reduce your choices in general elections. Over a third of the statewide and congressional candidates who appeared on the general election ballot in 2000 would have been eliminated in the primary if I-872 had been the law.

Third Parties and Independents Eliminated: If I-872 is passed, third parties, minor parties and even independents will be eliminated from the general election ballot, leaving (in most cases) one Republican and one Democrat. In November 2000, 180,000 voters who voted for third party candidates in the general election would never have had that choice if I-872 had been the law. Insulating the top two political parties from competition is a bad idea.

Single-Party Elections Will Result: Under I-872 many voters will not be able to vote for a candidate that represents their philosophy because the two top vote-getters in a race may be of the same party resulting in only one party being represented on the November ballot. In one-third of the races for Governor in the last twenty-five years, I-872 would have resulted in two general election gubernatorial candidates from the same party. In fact, the voters'

ultimate choice for Governor in 1980, John Spellman, would never have appeared on the November ballot.

We urge you to preserve Washington's independent, multi-partisan election system by voting No on I-872.

For more information, call 206.652.8904 or visit www.No872.org .

Rebuttal of Statement For

The League of Women Voters and many others believe I-872 is bad for Washington. I-872 does not"restore the kind of choice" voters had in the past. *It reduces everybody's choice in the general election.*

It decreases general election ballot diversity by eliminating third party candidates and independents. Some November ballots may have choices from only one party for an office.

Support good government and general election choices. *Vote No on I-872.*

Voters' Pamphlet Argument Prepared by:

JUDY GOLBERG, Chair, President of Washington League of Women Voters; GARY LOCKE, Governor of the State of Washington, Democrat; KEN EIKENBERRY, former Washington Attorney General, past State Republican Chair; JOCELYN LANGLOIS, acting Chair, Libertarian Party of Washington State; JODY GRAGE HAUG, Membership Chair, Green Party of Washington; JOAN THOMAS, past President Seattle LWV, past President Washington LWV.

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Complete Text of

INITIATIVE MEASURE NO. 872

AN ACT Relating to elections and primaries; amending RCW 29A.04.127, 29A.36.170, 29A.04.310, 29A.24.030, 29A.24.210, 29A.36.010, 29A.52.010, 29A.80.010, and 42.12.040; adding a new section to chapter 29A.04 RCW; adding a new section to chapter 29A.52 RCW; adding a new section to chapter 29A.32 RCW; creating new sections; repealing RCW 29A.04.157, 29A.28.010, 29A.28.020, and 29A.36.190; and providing for contingent effect.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

TITLE

NEW SECTION. Sec. 1. This act may be known and cited as the People's Choice Initiative of 2004.

LEGISLATIVE INTENT: PROTECTING VOTERS' RIGHTS AND CHOICE

NEW SECTION. Sec. 2. The Washington Constitution and laws protect each voter's right to vote for any candidate for any office. The Washington State Supreme Court has upheld the blanket primary as protecting compelling state interests "allowing each voter to keep party

identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary." *Heavey v. Chapman*, 93 Wn.2d 700, 705, 611 P.2d 1256 (1980). The Ninth Circuit Court of Appeals has threatened this system through a decision, that, if not overturned by the United States Supreme Court, may require change. In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective to implement a system that best protects the rights of voters to make such choices, increases voter participation, and advances compelling interests of the state of Washington.

WASHINGTON VOTERS' RIGHTS

NEW SECTION. Sec. 3. The rights of Washington voters are protected by its Constitution and laws and include the following fundamental rights:

(1) The right of qualified voters to vote at all elections;

(2) The right of absolute secrecy of the vote. No voter may be required to disclose political faith or adherence in order to vote;

(3) The right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.

DEFINITIONS

NEW SECTION. Sec. 4. A new section is added to chapter 29A.04 RCW to read as follows:

"Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name. The following are partisan offices:

(1) United States senator and United States representative;

(2) All state offices, including legislative, except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise.

Sec. 5. RCW 29A.04.127 and 2003 c 111 s 122 are each amended to read as follows:

"Primary" or "primary election" means a ((~~statutory~~)) procedure for ((~~nominating~~)) winnowing candidates ((~~to~~)) for public office ((~~at the polls~~)) to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.

Sec. 6. RCW 29A.36.170 and 2003 c 111 s 917 are each amended to read as follows:

(1) ((~~Except as provided in RCW 29A.36.180 and in subsection (2) of this section, on the ballot at the general election for a nonpartisan~~)) For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name((s)) of the candidate who

received the greatest number of votes will appear first and the candidate who received the next greatest number of votes ((~~for that office shall appear under the title of that office, and the names shall appear in that order. If a primary was conducted,~~)) will appear second. No candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding primary, if a primary was conducted. On the ballot at the general election for ((~~any other nonpartisan~~)) an office for which no primary was held, the names of the candidates shall be listed in the order determined under RCW 29A.36.130.

(2) ((~~On the ballot at the general election~~)) For the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed ((~~under the title of the office~~)) for that position on the ballot at the general election.

NEW SECTION. Sec. 7. A new section is added to chapter 29A.52 RCW to read as follows:

(1) A primary is a first stage in the public process by which voters elect candidates to public office.

(2) Whenever candidates for a partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter. Based upon votes cast at the primary, the top two candidates will be certified as qualified to appear on

the general election ballot, unless only one candidate qualifies as provided in RCW 29A.36.170.

(3) For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots by appropriate abbreviation as set forth in rules of the secretary of state. A candidate may express no party or independent preference. Any party or independent preferences are shown for the information of voters only and may in no way limit the options available to voters.

CONFORMING AMENDMENTS

Sec. 8. RCW 29A.04.310 and 2003 c 111 s 143 are each amended to read as follows:

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((~~Nominating~~)) Primaries for general elections to be held in November must be held on:

(1) The third Tuesday of the preceding September; or ((~~on~~))

(2) The seventh Tuesday immediately preceding ((~~such~~)) that general election, whichever occurs first.

Sec. 9. RCW 29A.24.030 and 2003 c 111 s 603 are each amended to read as follows:

A candidate who desires to have his or her

name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) For partisan offices only, a place for the candidate to indicate ((~~a~~)) his or her major or minor party ((~~designation, if applicable~~)) preference, or independent status;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under RCW 29A.24.090;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed

electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in RCW 29A.24.090.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process.

Sec. 10. RCW 29A.24.210 and 2003 c 111 s 621 are each amended to read as follows:

Filings for a partisan elective office shall be opened for a period of three normal business days whenever, on or after the first day of the regular filing period and before the sixth Tuesday prior to ((~~a primary~~)) an election, a vacancy occurs in that office, leaving an unexpired term to be filled by an election for which filings have not been held.

Any ((~~such~~)) special three-day filing period shall be fixed by the election officer with whom declarations of candidacy for that office are filed. The election officer shall give notice of the special three-day filing period by notifying the press, radio, and television in the county or counties involved, and by ((~~such~~)) any other means as may be required by law.

Candidacies validly filed within the special three-day filing period shall appear on the primary or general election ballot as if filed during the regular filing period.

The procedures for filings for partisan offices

where a vacancy occurs under this section or a void in candidacy occurs under RCW 29A.24.140 must be substantially similar to the procedures for nonpartisan offices under RCW 29A.24.150 through 29A.24.170.

NEW SECTION. Sec. 11. A new section is added to chapter 29A.32 RCW to read as follows:

The voters' pamphlet must also contain the political party preference or independent status where a candidate appearing on the ballot has expressed such a preference on his or her declaration of candidacy.

Sec. 12. RCW 29A.36.010 and 2003 c 111 s 901 are each amended to read as follows:

On or before the day following the last day allowed for ((~~political parties to fill vacancies in the ticket as provided by RCW 29A.28.010~~)) candidates to withdraw under RCW 29A.24.130, the secretary of state shall certify to each county auditor a list of the candidates who have filed declarations of candidacy in his or her office for the primary. For each office, the certificate shall include the name of each candidate, his or her address, and his or her party ((~~designation, if any~~)) preference or independent designation as shown on filed declarations.

Sec. 13. RCW 29A.52.010 and 2003 c 111 s 1301 are each amended to read as follows:

Whenever it shall be necessary to hold a special election in an odd-numbered year to fill an unexpired term of any office which is scheduled to be voted upon for a full term in an even-numbered year, no ((~~September~~)) primary election shall be held in

the odd-numbered year if, after the last day allowed for candidates to withdraw, ((~~either of the following circumstances exist:~~

~~(1) No more than one candidate of each qualified political party~~

~~has filed a declaration of candidacy for the same partisan office to be filled; or~~

~~(2)~~))) no more than two candidates have filed a declaration of candidacy for a single ((~~nonpartisan~~)) office to be filled.

In ((~~either~~)) this event, the officer with whom the declarations of candidacy were filed shall immediately notify all candidates concerned and the names of the candidates that would have been printed upon the ((~~September~~)) primary ballot, but for the provisions of this section, shall be printed as ((~~nominees~~)) candidates for the positions sought upon the ((~~November~~)) general election ballot.

Sec. 14. RCW 29A.80.010 and 2003 c 111 s 2001 are each amended to read as follows:

(((~~(1)~~))) Each political party organization may((~~:~~

~~(a) Make its own~~)) adopt rules ((~~and regulations; and~~

~~(b) Perform all functions inherent in such an organization.~~

~~(2) Only major political parties may designate candidates to appear on the state primary ballot as provided in RCW 29A.28.010~~)) governing its own organization and the nonstatutory functions of that organization.

Sec. 15. RCW 42.12.040 and 2003 c 238 s 4 are each amended to read as follows:

(1) If a vacancy occurs in any partisan elective office in the executive or legislative branches of state government or in any partisan county elective office before the sixth Tuesday prior to the ((~~primary for the~~)) next general election following the occurrence

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of the vacancy, a successor shall be elected to that office at that general election. Except during the last year of the term of office, if such a vacancy occurs on or after the sixth Tuesday prior to the ((~~primary for that~~)) general election, the election of the successor shall occur at the next succeeding general election. The elected successor shall hold office for the remainder of the unexpired term. This section shall not apply to any vacancy occurring in a charter county ((~~which~~)) that has charter provisions inconsistent with this section.

(2) If a vacancy occurs in any legislative office or in any partisan county office after the general election in a year that the position appears on the ballot and before the start of the next term, the term of the successor who is of the same party as the incumbent may commence once he or she has qualified as defined in RCW ((~~29.01.135~~)) 29A.04.133 and shall continue through the term for which he or she was elected.

CODIFICATION AND REPEALS

NEW SECTION. Sec. 16. The code reviser shall revise the caption of any section of Title 29A RCW as needed to reflect changes made through this Initiative.

NEW SECTION. Sec. 17. The following acts or parts of acts are each repealed:

(1) RCW 29A.04.157 (September primary) and 2003 c 111 s 128;

(2) RCW 29A.28.010 (Major party ticket) and 2003 c 111 s 701, 1990 c 59 s 102, 1977 ex.s. c 329 s 12, & 1965 c 9 s 29.18.150;

(3) RCW 29A.28.020 (Death or disqualification--Correcting ballots--Counting votes already cast) and 2003 c 111 s 702, 2001 c 46 s 4, & 1977 ex.s. c 329 s 13; and

(4) RCW 29A.36.190 (Partisan candidates qualified for general election) and 2003 c 111 s 919.

NEW SECTION. Sec. 18. This act takes effect only if the Ninth Circuit Court of Appeals' decision in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003) holding the blanket primary election system in Washington state invalid becomes final and a Final Judgment is entered to that effect.

Complete Text of

INITIATIVE MEASURE NO. 884

AN ACT Relating to education' amending RCW 28A.505.210, 82.14.410, 84.52.068, 28B.119.010, 43.09.050, 82.08.020, 82.12.045, and

67.28.181; reenacting and amending RCW 43.79A.040; adding new sections to chapter 28A.215 RCW; adding a new section to 82.12 RCW; adding a new chapter to Title 28A RCW; adding a new chapter to Title 28B RCW; adding a new chapter to Title 43 RCW; creating new sections; repealing RCW 28A.215.100, 28A.215.110, 28A.215.120, 28A.215.130, 28A.215.140, 28A.215.150, 28A.215.160, 28A, 28A.215.170, 28A.215.180, 28A.215.190, 28A.215.200, 28A.215.900, 28A.215.904, 28A.215.906, and 28A.215.908; and providing and effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1 FINDINGS. The people of the state of Washington find that:

(1) To compete successfully in the 21st century economy, Washington's citizens must be equipped with the best education and skills in the nation. Education today requires a seamless, integrated, and connected approach to learning, from early childhood to higher education and beyond.

(2) We are demanding more than ever from students and teachers, but our political leaders have ignored the will of the people and have failed to make the investments called for to meet these demands. The state has fallen behind the nation in funding per student at a time when we have committed ourselves to higher standards for all children.

(3) Too many of this state's kindergartners are not ready for school. Too many children do not read

at grade level. Too many children do not graduate from high school. Too many college students need remedial classes and too many leave without degrees.

(4) Thousands of eligible low-income children are denied preschool opportunities that would better prepare them for school. Our students sit in the fourth most crowded classrooms in the nation. The state's colleges and universities cannot accommodate tens of thousands of students expected to graduate from high school in the next few years.

(5) To create the best-prepared work force in the country, to fuel the state's economic development, and to strengthen civic participation of the next generation, we must invest more in early childhood education, K-12, and postsecondary education.

(6) Any new funds raised to improve education must be protected and used only for that purpose.

NEW SECTION. Sec. 2 INTENT. (1) It is the intent of the people to create a dedicated education trust fund that will enhance current education funding and make the additional investments needed to help students meet the educational and economic challenges of our time. The education trust fund will operate on three core principles:

(a) **STRATEGIC, TARGETED INVESTMENT.** The education trust fund makes carefully targeted investments to help teachers have the greatest impact on their students and to help

families make the greatest gains in access to education and opportunity.

The above text is an exact reproduction as submitted by the Sponsor. The Office of the Secretary of State has no editorial authority.

EXHIBIT B

CERTIFICATION OF ENROLLMENT

ENGROSSED SENATE BILL 6543

Chapter 271, Laws of 2004

(partial veto)

58th Legislature
2004 Regular Session

PRIMARY ELECTIONS

EFFECTIVE DATE: 4/1/04 - Except sections 102 through 193, which become effective 6/10/04.

Passed by the Senate
March 10, 2004

YEAS 36 NAYS 12

BRAD OWEN
President of the Senate

Passed by the House
March 8, 2004

YEAS 51 NAYS 46

FRANK CHOPP
Speaker of the House of Representatives

Approved April 1, 2004, with the exception of sections 1 through 57; 101; and 201, which are vetoed.

GARY F. LOCKE
Governor of the State of Washington

CERTIFICATE

I, Milton H. Doumit, Jr., Secretary of the Senate of the State of Washington, do hereby certify that the attached is ENGROSSED SENATE BILL 6453 as passed by the Senate and the House of Representatives on the dates hereon set forth.

MILTON H. DOUMIT JR.
Secretary

FILED

April 1, 2004 - 10:25 a.m.

Secretary of State
State of Washington

ENGROSSED SENATE BILL 6453

AS AMENDED BY THE HOUSE

Passed Legislature - 2004 Regular Session

State of Washington 58th Legislature
2004 Regular Session

By Senators Roach, Hargrove, Hale, T. Sheldon, Schmidt, Winsley, McCaslin, Carlson, Fairley and Rasmussen; by request of Secretary of State

Read first time 01/21/2004. Referred to Committee on Government Operations & Elections.

AN ACT Relating to a qualifying primary; amending RCW 29A.04.085, 29A.04.127, 29A.04.310, 29A.20.020, 29A.20.120, 29A.20.140, 29A.20.150, 29A.20.160, 29A.20.170, 29A.20.180, 29A.20.190, 29A.24.030, 29A.24.080, 29A.24.090, 29A.24.100, 29A.24.110, 29A.24.140, 29A.24.150, 29A.24.160, 29A.24.170, 29A.24.180, 29A.24.190, 29A.24.310, 29A.28.040, 29A.28.060, 29A.32.030, 29A.36.010, 29A.36.070, 29A.36.100, 29A.36.170, 29A.36.200, 29A.52.010, 29A.52.110, 29A.52.230, 29A.52.320, 29A.52.350, 29A.60.020, 29A.60.220, 29A.64.010, 29A.64.020, 29A.64.040, 29A.64.060, 29A.64.080, 29A.68.010, 29A.80.010, 29A.84.260, 29A.84.310, 29A.84.710, and 42.17.020; reenacting and amending RCW 29A.32.120; adding new sections to chapter 29A.52 RCW; adding new sections to chapter 29A.04 RCW; adding new sections to chapter 29A.28 RCW; adding new sections to chapter 29A.08 RCW; adding a new section to chapter 29A.12 RCW; adding new sections to chapter 29A.20 RCW; adding new sections

to chapter 29A.24 RCW; adding new sections to chapter 29A.32 RCW; adding new sections to chapter 29A.36 RCW; adding new sections to chapter 29A.40 RCW; adding new sections to chapter 29A.44 RCW; adding new sections to chapter 29A.60 RCW; adding new sections to chapter 29A.80 RCW; adding new sections to chapter 29A.64 RCW; adding a new section to chapter 29A.68 RCW; adding new sections to chapter 29A.84 RCW; creating new sections; repealing RCW 29A.04.157, 29A.20.110, 29A.20.130, 29A.20.200, 29A.24.200, 29A.24.210, 29A.28.010, 29A.28.020, 29A.36.190, 29A.52.130, 29A.04.903, 29A.04.007, 29A.04.085, 29A.04.127, 29A.04.215, 29A.04.310, 29A.04.320, 29A.04.610, 29A.12.100, 29A.20.020, 29A.20.120, 29A.20.140, 29A.20.150, 29A.20.160, 29A.20.170, 29A.20.180, 29A.20.190, 29A.24.030, 29A.24.080, 29A.24.090, 29A.24.100, 29A.24.110, 29A.24.130, 29A.24.140, 29A.24.150, 29A.24.160, 29A.24.170, 29A.24.180, 29A.24.190, 29A.24.310, 29A.28.040, 29A.28.060, 29A.28.070, 29A.32.030, 29A.32.120, 29A.32.240, 29A.36.010, 29A.36.070, 29A.36.100, 29A.36.110, 29A.36.120, 29A.36.130, 29A.36.140, 29A.36.150, 29A.36.160, 29A.36.170, 29A.36.200, 29A.40.060, 29A.40.090, 29A.44.200, 29A.44.220, 29A.44.230, 29A.52.010, 29A.52.110, 29A.52.120, 29A.52.230, 29A.52.310, 29A.52.320, 29A.52.350, 29A.60.020, 29A.60.220, 29A.64.010, 29A.64.020, 29A.64.040, 29A.64.060, 29A.64.080, 29A.68.010, 29A.80.010, 29A.80.040, 29A.80.050, 29A.80.060, 29A.84.260, 29A.84.310, and 29A.84.710; prescribing penalties; providing a contingent effective date; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

PART 1 - QUALIFYING PRIMARY

***NEW SECTION.** Sec. 1. A new section is added to chapter 29A.52 RCW to read as follows:

(1) This act may be known and cited as the Qualifying Primary Act.

(2) The purpose of any primary held in this state is to qualify candidates to appear on the general election ballot. Primary elections do not function as a procedure to determine the nominees of political parties. The sole purpose of allowing candidates to identify a political party preference is to provide to voters a brief description of each candidate's political philosophy, which the voters may consider when casting their votes at a primary or general election. In a primary election, each voter, regardless of party affiliation, may vote for any candidate listed on the ballot, and the two candidates who receive the most votes, also known as the top two vote getters, and who receive at least one percent of the total votes cast for that office, advance to the general election. Primary election voters are not choosing a party's nominee. A qualifying primary ensures more choice, greater participation, increased privacy, and a sense of fairness for the voters.

(3) The provisions of this title relating to primaries must be liberally construed to further the following interests:

(a) The legislature finds that the process of determining which candidates will appear on the general election ballot or be elected to office is a

public process, in which all voters must be permitted to participate. The legislature further finds that it is not in the public interest to expend public funds on an election procedure that limits the rights of voters by restricting their ability to participate based on the party affiliation, if any, of the voters or the candidates, or that requires voters to publicly declare an affiliation with a political party;

(b) All qualified registered voters of the state of Washington should be permitted to participate in all meaningful stages of the process for qualifying candidates to appear on the general election ballot by voting for the candidates of their choice in the districts and jurisdictions where they are eligible to vote; and

(c) No registered voter of the state of Washington should be required to divulge to any public or private entity his or her party affiliation, if any, as a prerequisite to voting.

**Sec. 1 was vetoed. See message at end of chapter.*

***NEW SECTION.** Sec. 2. The rights of Washington voters are protected by its Constitution and laws and include the following fundamental rights:

(1) The right of qualified voters to vote at all elections;

(2) The right of absolute secrecy of the vote. No voter may be required to disclose political faith or adherence in order to vote;

(3) The right to cast a vote for any candidate for each office without any limitation based on party

preference or affiliation, of either the voter or the candidate.

**Sec. 2 was vetoed. See message at end of chapter.*

*Sec. 3. RCW 29A.04.085 and 2003 c 111 s 115 are each amended to read as follows:

"Major political party" means a political party ((of which at least one nominee for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year. A political party qualifying as a major political party under this section retains such status until the next even-year election at which a candidate of that party does not achieve at least five percent of the vote for one of the previously specified offices. If none of these offices appear on the ballot in an even-year general election, the major party retains its status as a major party through that election)) identified on the declaration of candidacy of at least one candidate for statewide office who received at least five percent of the total votes cast for that office at the last primary or general election in a year that the office of governor appeared on the ballot. Once qualified, a major political party retains such status until the next primary or general election in a year that the office of governor appears on the ballot.

**Sec. 3 was vetoed. See message at end of chapter.*

***NEW SECTION.** Sec. 4. A new section is added to chapter 29A.04 RCW to read as follows:

"Partisan office" means an office for which a candidate may identify a political philosophy under

RCW 29A.24.030(3), and is limited to the following offices:

(1) United States senator and representative;

(2) All state offices except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices where a county home rule charter provides otherwise.

**Sec. 4 was vetoed. See message at end of chapter.*

*Sec. 5. RCW 29A.04.127 and 2003 c 111 s 122 are each amended to read as follows:

"Primary" ((or "primary election")) means a statutory qualifying procedure ((for nominating candidates to public office at the polls)) in which each registered voter eligible to vote in the district or jurisdiction is permitted to cast a vote for his or her preferred candidate for each office appearing on the ballot, without any limitation based on party preference or affiliation on the part of the voter or the candidate, with the result that not more than two candidates for each office qualify to appear on the general election ballot.

**Sec. 5 was vetoed. See message at end of chapter.*

*Sec. 6. RCW 29A.04.310 and 2003 c 111 s 143 are each amended to read as follows:

((Nominating)) Qualifying primaries for general elections to be held in November must be held on the third Tuesday of the preceding September or on the seventh Tuesday immediately preceding such general election, whichever occurs first.

Sec. 6 was vetoed. See message at end of chapter.

*Sec. 7. RCW 29A.20.020 and 2003 c 111 s 502 are each amended to read as follows:

(1) A person filing a declaration of candidacy for an office shall, at the time of filing, be a registered voter and possess the qualifications specified by law for persons who may be elected to the office.

(2) Excluding the office of precinct committee officer or a temporary elected position such as a charter review board member or freeholder, no person may file for more than one office.

(3) The name of a candidate for an office shall not appear on a ballot for that office unless, except as provided in RCW 3.46.067 and 3.50.057, the candidate is, at the time the candidate's declaration of candidacy is filed, properly registered to vote in the geographic area represented by the office. For the purposes of this section, each geographic area in which registered voters may cast ballots for an office is represented by that office. If a person elected to an office must be ((nominated)) qualified from a district or similar division of the geographic area represented by the office, the name of a candidate for the office shall not appear on a primary ballot for that office unless the candidate is, at the time the candidate's declaration of candidacy is filed, properly registered to vote in that district or division. The officer with whom declarations of candidacy must be filed under this title shall review each such declaration filed regarding compliance with this subsection.

(4) ((This section does not apply to the office of a member of the United States Congress.)) The requirements of voter registration and residence within the geographic area of a district do not apply to candidates for congressional office. Qualifications for United States Congress are specified in the United States Constitution.

Sec. 7 was vetoed. See message at end of chapter.

*Sec. 8. RCW 29A.20.120 and 2003 c 111 s 506 are each amended to read as follows:

(((1) Any nomination of a candidate for partisan public office by other than a major political party may be made only: (a) In a convention held not earlier than the last Saturday in June and not later than the first Saturday in July or during any of the seven days immediately preceding the first day for filing declarations of candidacy as fixed in accordance with RCW 29A.28.040; (b) as provided by RCW 29A.60.020; or (c) as otherwise provided in this section.

(2))) Nominations of candidates for president and vice president of the United States other than by a major political party ((may)) must be made ((either at a convention conducted under subsection (1) of this section, or)) at a ((similar)) convention ((taking place)) to be held not earlier than the first Sunday in July and not later than seventy days before the general election. ((Conventions held during this time period may not nominate candidates for any public office other than president and vice president of the United States, except as provided in subsection (3) of this section.

(3) If a special filing period for a partisan office is opened under RCW 29A.24.210, candidates of minor political parties and independent candidates may file for office during that special filing period. The names of those candidates may not appear on the ballot unless they are nominated by convention held no later than five days after the close of the special filing period and a certificate of nomination is filed with the filing officer no later than three days after the convention. The requirements of RCW 29A.20.130 do not apply to such a convention. If primary ballots or a voters' pamphlet are ordered to be printed before the deadline for submitting the certificate of nomination and the certificate has not been filed, then the candidate's name will be included but may not appear on the general election ballot unless the certificate is timely filed and the candidate otherwise qualifies to appear on that ballot.

(4) A minor political party may hold more than one convention but in no case shall any such party nominate more than one candidate for any one partisan public office or position. For the purpose of nominating candidates for the offices of president and vice president, United States senator, or a statewide office, a minor party or independent candidate holding multiple conventions may add together the number of signatures of different individuals from each convention obtained in support of the candidate or candidates in order to obtain the number required by RCW 29A.20.140. For all other offices for which nominations are made, signatures of the requisite number of registered voters must be obtained at a single convention.))

Sec. 8 was vetoed. See message at end of chapter.

*Sec. 9. RCW 29A.20.140 and 2003 c 111 s 508 are each amended to read as follows:

(((1) To be valid, a convention must be attended by at least twenty-five registered voters.

(2))) In order to nominate candidates for the offices of president and vice president of the United States, ((United States senator, or any statewide office,)) a nominating convention shall obtain and submit to the filing officer the signatures of at least two hundred registered voters of the state of Washington. ((In order to nominate candidates for any other office, a nominating convention shall obtain and submit to the filing officer the signatures of twenty-five persons who are registered to vote in the jurisdiction of the office for which the nominations are made.))

Sec. 9 was vetoed. See message at end of chapter.

*Sec. 10. RCW 29A.20.150 and 2003 c 111 s 509 are each amended to read as follows:

A nominating petition submitted under this chapter shall clearly identify the name of the minor party or independent candidate ((convention as it appears on the certificate of nomination as required by RCW 29A.20.160(3))). The petition shall also contain a statement that the person signing the petition is a registered voter of the state of Washington and shall have a space for the voter to sign his or her name and to print his or her name and address. ((No person may sign more than one nominating petition under this chapter for an office for a primary or election.)) The nominating petition

must be submitted to the secretary of state not later than ten days after adjournment of the convention.

**Sec. 10 was vetoed. See message at end of chapter.*

*Sec. 11. RCW 29A.20.160 and 2003 c 111 s 510 are each amended to read as follows:

A certificate evidencing nominations of candidates for the offices of president and vice president made at a convention must:

(1) Be in writing;

(2) Contain the name of each person nominated ((, his or her residence, and the office for which he or she is named, and if the nomination is)) for the offices of president and vice president of the United States, their addresses, and a sworn statement from both nominees giving their consent to the nomination;

(3) Identify the minor political party or the independent candidate on whose behalf the convention was held;

(4) Be verified by the oath of the presiding officer and secretary;

(5) Be accompanied by a nominating petition or petitions bearing the signatures and addresses of registered voters equal in number to that required by RCW 29A.20.140;

(6) Contain proof of publication of the notice of calling the convention; and

(7) Be submitted to the ((appropriate filing officer)) secretary of state not later than one week following the adjournment of the convention at which the nominations were made. ((If the nominations are

made only for offices whose jurisdiction is entirely within one county, the certificate and nominating petitions must be filed with the county auditor. If a minor party or independent candidate convention nominates any candidates for offices whose jurisdiction encompasses more than one county, all nominating petitions and the convention certificates must be filed with the secretary of state.))

**Sec. 11 was vetoed. See message at end of chapter.*

*Sec. 12. RCW 29A.20.170 and 2003 c 111 s 511 are each amended to read as follows:

(1) If two or more valid certificates of nomination are filed purporting to nominate different candidates for ((the same position)) president and vice president using the same party name, the filing officer must give effect to both certificates. If conflicting claims to the party name are not resolved either by mutual agreement or by a judicial determination of the right to the name, the candidates must be treated as independent candidates. Disputes over the right to the name must not be permitted to delay the printing of either ballots or a voters' pamphlet. ((Other candidates nominated by the same conventions may continue to use the partisan affiliation unless a court of competent jurisdiction directs otherwise.))

(2) A person affected may petition the superior court of the county in which the filing officer is located for a judicial determination of the right to the name of a minor political party, either before or after documents are filed with the filing officer. The court shall resolve the conflict between competing claims to the use of the same party name according to the

following principles: (a) The prior established public use of the name during previous elections by a party composed of or led by the same individuals or individuals in documented succession; (b) prior established public use of the name earlier in the same election cycle; (c) ((the nomination of a more complete slate of candidates for a number of offices or in a number of different regions of the state; (d))) documented affiliation with a national or statewide party organization with an established use of the name; (((e))) (d) the first date of filing of a certificate of nomination; and (((f))) (e) such other indicia of an established right to use of the name as the court may deem relevant. ((If more than one filing officer is involved, and one of them is the secretary of state, the petition must be filed in the superior court for Thurston county.)) Upon resolving the conflict between competing claims, the court may also address any ballot designation for the candidate who does not prevail.

**Sec. 12 was vetoed. See message at end of chapter.*

*Sec. 13. RCW 29A.20.180 and 2003 c 111 s 512 are each amended to read as follows:

A minor political party or independent candidate convention nominating candidates for the offices of president and vice president of the United States shall, not later than ten days after the adjournment of the convention, submit a list of presidential electors to the office of the secretary of state. The list shall contain the names and the mailing addresses of the persons selected and shall be verified by the ((presiding officer of the convention)) candidates named on the nominating petition.

Sec. 13 was vetoed. See message at end of chapter.

*Sec. 14. RCW 29A.20.190 and 2003 c 111 s 513 are each amended to read as follows:

Upon the receipt of the ((certificate of nomination)) nominating petition, the ((officer with whom it is filed shall check the certificate and)) secretary of state shall canvass the signatures ((on the accompanying nominating petitions to determine if the requirements of RCW 29A.20.140 have been met)). Once the determination of the sufficiency of the petitions has been made, the filing officer shall notify the ((presiding officer of the convention)) candidates and any other persons requesting the notification ((, of his or her decision regarding the sufficiency of the certificate or the nominating petitions)). Any appeal regarding the filing officer's determination must be filed with the superior court of the county in which the certificate or petitions were filed not later than five days from the date the determination is made, and shall be heard and finally disposed of by the court within five days of the filing. Nominating petitions shall not be available for public inspection or copying.

Sec. 14 was vetoed. See message at end of chapter.

*Sec. 15. RCW 29A.24.030 and 2003 c 111 s 603 are each amended to read as follows:

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy. The secretary of state shall adopt, by rule, a

declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) For those offices defined in section 4 of this act only, a place for the candidate to ((indicate a party designation, if applicable)) identify a major or minor political party, if any, the candidate regards as best approximating his or her own political philosophy. No candidate may list more than one political party. Nothing in this indication of political philosophy may be construed as denoting an endorsement or nomination by that party. The sole purpose of allowing candidates to identify a political party preference is to provide to voters a brief description of each candidate's political philosophy, which the voters may consider when casting their votes at a primary or general election;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a ((nominating)) petition in lieu of the filing fee under RCW 29A.24.090;

(5) A place for the candidate to sign the declaration of candidacy, stating that the

information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in RCW 29A.24.090.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process.

**Sec. 15 was vetoed. See message at end of chapter.*

*Sec. 16. RCW 29A.24.080 and 2003 c 111 s 608 are each amended to read as follows:

Any candidate may mail his or her declaration of candidacy for an office to the filing officer. Such declarations of candidacy shall be processed by the filing officer in the following manner:

(1) Any declaration received by the filing officer by mail before the tenth business day immediately preceding the first day for candidates to file for office shall be returned to the candidate submitting it, together with a notification that the declaration of candidacy was received too early to be processed. The candidate shall then be permitted to resubmit his or her declaration of candidacy during the filing period.

(2) Any properly executed declaration of candidacy received by mail on or after the tenth business day immediately preceding the first day for candidates to file for office and before the close of business on the last day of the filing period shall be included with filings made in person during the filing period. In primaries for partisan office and judicial ((elections)) offices the filing officer shall determine by lot the order in which the names of those candidates shall appear upon sample and absentee primary ballots.

(3) Any declaration of candidacy received by the filing officer after the close of business on the last day for candidates to file for office shall be rejected and returned to the candidate attempting to file it.

**Sec. 16 was vetoed. See message at end of chapter.*

*Sec. 17. RCW 29A.24.090 and 2003 c 111 s 609 are each amended to read as follows:

A filing fee of one dollar shall accompany each declaration of candidacy for precinct committee officer; a filing fee of ten dollars shall accompany the declaration of candidacy for any office with a fixed annual salary of one thousand dollars or less; a filing fee equal to one percent of the annual salary of the office at the time of filing shall accompany the declaration of candidacy for any office with a fixed annual salary of more than one thousand dollars per annum. No filing fee need accompany a declaration of candidacy for any office for which compensation is on a per diem or per meeting attended basis.

A candidate who lacks sufficient assets or income at the time of filing to pay the filing fee required by this section shall submit with his or her

declaration of candidacy a ((nominating)) filing petition. The petition shall contain not less than a number of signatures of registered voters equal to the number of dollars of the filing fee. The signatures shall be of voters registered to vote within the jurisdiction of the office for which the candidate is filing.

When the candidacy is for:

(1) A legislative or judicial office that includes territory from more than one county, the fee shall be paid to the secretary of state for equal division between the treasuries of the counties comprising the district.

(2) A city or town office, the fee shall be paid to the county auditor who shall transmit it to the city or town clerk for deposit in the city or town treasury.

**Sec. 17 was vetoed. See message at end of chapter.*

*Sec. 18. RCW 29A.24.100 and 2003 c 111 s 610 are each amended to read as follows:

The ((nominating)) filing petition authorized by RCW 29A.24.090 shall be printed on sheets of uniform color and size, shall contain no more than twenty numbered lines, and must be in substantially the following form:

The warning prescribed by RCW 29A.72.140; followed by:

We, the undersigned registered voters of . . .(the state of Washington or the political subdivision for which the ((nomination)) filing is made). . ., hereby petition that the name of . . . (candidate's name). . . be printed on the official primary ballot for the office of . . .(insert name of office). . ..

If the candidate listed a political party on the declaration of candidacy, then the name of that party must appear on the filing petition.

The petition must include a place for each individual to sign and print his or her name, and the address, city, and county at which he or she is registered to vote.

**Sec. 18 was vetoed. See message at end of chapter.*

*Sec. 19. RCW 29A.24.110 and 2003 c 111 s 611 are each amended to read as follows:

((Nominating)) Petitions may be rejected for the following reasons:

(1) The petition is not in the proper form;

(2) The petition clearly bears insufficient signatures;

(3) The petition is not accompanied by a declaration of candidacy;

(4) The time within which the petition and the declaration of candidacy could have been filed has expired.

If the petition is accepted, the officer with whom it is filed shall canvass the signatures contained on it and shall reject the signatures of those persons who are not registered voters and the signatures of those persons who are not registered to vote within the jurisdiction of the office for which the ((nominating)) petition is filed. He or she shall additionally reject any signature that appears on the ((nominating)) petitions of two or more candidates for the same office and shall also reject, each time it

appears, the name of any person who signs the same petition more than once.

If the officer with whom the petition is filed refuses to accept the petition or refuses to certify the petition as bearing sufficient valid signatures, the person filing the petition may appeal that action to the superior court. The application for judicial review shall take precedence over other cases and matters and shall be speedily heard and determined.

**Sec. 19 was vetoed. See message at end of chapter.*

*Sec. 20. RCW 29A.24.140 and 2003 c 111 s 614 are each amended to read as follows:

A void in candidacy for ((a nonpartisan)) an office occurs when an election for such office, except for the short term, has been scheduled and no valid declaration of candidacy has been filed for the position or all persons filing such valid declarations of candidacy have died or been disqualified.

**Sec. 20 was vetoed. See message at end of chapter.*

*Sec. 21. RCW 29A.24.150 and 2003 c 111 s 615 are each amended to read as follows:

The election officer with whom declarations of candidacy are filed shall give notice of a void in candidacy for ((a nonpartisan)) an office ((,)) by notifying press, radio, and television in the county or counties involved and by such other means as may now or hereafter be provided by law. The notice shall state the office, and the time and place for filing declarations of candidacy.

**Sec. 21 was vetoed. See message at end of chapter.*

*Sec. 22. RCW 29A.24.160 and 2003 c 111 s 616 are each amended to read as follows:

Filings to fill a void in candidacy for ((nonpartisan)) an office must be made in the same manner and with the same official as required during the regular filing period for such office ((, except that nominating signature petitions that may be required of candidates filing for certain district offices during the normal filing period may not be required of candidates filing during the special three-day filing period)).

**Sec. 22 was vetoed. See message at end of chapter.*

*Sec. 23. RCW 29A.24.170 and 2003 c 111 s 617 are each amended to read as follows:

Filings for ((a nonpartisan)) an office shall be reopened for a period of three normal business days, such three day period to be fixed by the election officer with whom such declarations of candidacy are filed and notice thereof given by notifying press, radio, and television in the county or counties and by such other means as may now or hereafter be provided by law whenever before the sixth Tuesday prior to a primary:

(1) A void in candidacy occurs;

(2) A vacancy occurs in ((any nonpartisan)) an office leaving an unexpired term to be filled by an election for which filings have not been held; or

(3) A ((nominee)) candidate for judge of the superior court entitled to a certificate of election pursuant to Article 4, section 29, Amendment 41 of the state Constitution, dies or is disqualified.

Candidacies validly filed within said three-day period shall appear on the ballot as if made during the earlier filing period.

Sec. 23 was vetoed. See message at end of chapter.

*Sec. 24. RCW 29A.24.180 and 2003 c 111 s 618 are each amended to read as follows:

Filings for a nonpartisan office (other than judge of the supreme court or superintendent of public instruction) shall be reopened for a period of three normal business days, such three day period to be fixed by the election officer with whom such declarations of candidacy are filed and notice thereof given by notifying press, radio, and television in the county and by such other means as may now or hereafter be provided by law, when:

(1) A void in candidacy for such nonpartisan office occurs on or after the sixth Tuesday prior to a primary but prior to the sixth Tuesday before an election; or

(2) A ((nominee)) candidate for judge of the superior court eligible after a contested primary for a certificate of election by Article 4, section 29, Amendment 41 of the state Constitution, dies or is disqualified within the ten day period immediately following the last day allotted for a candidate to withdraw; or

(3) A vacancy occurs in any nonpartisan office on or after the sixth Tuesday prior to a primary but prior to the sixth Tuesday before an election leaving an unexpired term to be filled by an election for which filings have not been held.

The candidate receiving a plurality of the votes cast for that office in the general election shall be deemed elected.

Sec. 24 was vetoed. See message at end of chapter.

*Sec. 25. RCW 29A.24.190 and 2003 c 111 s 619 are each amended to read as follows:

A scheduled election ((shall be lapsed)) lapses, the office is deemed stricken from the ballot, no purported write-in votes may be counted, and no candidate may be certified as elected, when:

(1) In an election for judge of the supreme court ((or)), superintendent of public instruction, or a partisan office, a void in candidacy occurs on or after the sixth Tuesday prior to a primary, public filings and the primary being an indispensable phase of the election process for such offices;

(2) Except as otherwise specified in RCW 29A.24.180, a ((nominee)) candidate for judge of the superior court entitled to a certificate of election pursuant to Article 4, section 29, Amendment 41 of the state Constitution dies or is disqualified on or after the sixth Tuesday prior to a primary;

(3) In other elections for nonpartisan office a void in candidacy occurs or a vacancy occurs involving an unexpired term to be filled on or after the sixth Tuesday prior to an election.

Sec. 25 was vetoed. See message at end of chapter.

*Sec. 26. RCW 29A.24.310 and 2003 c 111 s 622 are each amended to read as follows:

Any person who desires to be a write-in candidate and have such votes counted at a primary or election may file a declaration of candidacy with the officer designated in RCW 29A.24.070 not later than the day before the primary or election. Declarations of candidacy for write-in candidates must be accompanied by a filing fee in the same

manner as required of other candidates filing for the office as provided in RCW 29A.24.090.

Votes cast for write-in candidates who have filed such declarations of candidacy ((and write-in votes for persons appointed by political parties pursuant to RCW 29A.28.020)) need only specify the name of the candidate in the appropriate location on the ballot in order to be counted. Write-in votes cast for any other candidate, in order to be counted, must designate the office sought and position number ((or political party)), if the manner in which the write-in is done does not make the office or position clear. In order for write-in votes to be valid in jurisdictions employing optical-scan mark sense ballot systems the voter must complete the proper mark next to the write-in line for that office.

No person may file as a write-in candidate where:

(1) At a general election, the person attempting to file either filed as a write-in candidate for the same office at the preceding primary or the person's name appeared on the ballot for the same office at the preceding primary;

(2) The person attempting to file as a write-in candidate has already filed a valid write-in declaration for that primary or election, unless one or the other of the two filings is for the office of precinct committeeperson;

(3) The name of the person attempting to file already appears on the ballot as a candidate for another office, unless one of the two offices for which he or she is a candidate is precinct committeeperson.

The declaration of candidacy shall be similar to that required by RCW 29A.24.030. No write-in candidate filing under this section may be included in any voter's pamphlet produced under chapter 29A.32 RCW unless that candidate qualifies to have his or her name printed on the general election ballot. The legislative authority of any jurisdiction producing a local voter's pamphlet under chapter 29A.32 RCW may provide, by ordinance, for the inclusion of write-in candidates in such pamphlets.

**Sec. 26 was vetoed. See message at end of chapter.*

***NEW SECTION.** Sec. 27. A new section is added to chapter 29A.28 RCW to read as follows:

If the death or disqualification of a candidate for a partisan or nonpartisan office does not give rise to the opening of a new filing period under RCW 29A.24.170, then the following will occur:

(1) If the candidate dies or becomes disqualified after filing a declaration of candidacy but before the close of the filing period, then the declaration of candidacy is void and his or her name will not appear on the ballot;

(2) If the candidate dies or becomes disqualified after the close of the filing period but before the day of the primary, then his or her name will appear on the primary ballot and all otherwise valid votes for that candidate will be tabulated. The candidate's name will not appear on the general election ballot even if he or she otherwise would have qualified to do so, but no other candidate will advance, or be substituted, in the place of that candidate. If the candidate was the only candidate to qualify to advance to the general election, then the

general election for that office lapses, and the office will be regarded as vacant as of the time the newly elected official would have otherwise taken office;

(3) If the candidate dies or becomes disqualified on or after the day of the primary, and he or she would have otherwise qualified to appear on the general election ballot, then his or her name will appear on the general election ballot and all otherwise valid votes for that candidate will be tabulated. If the candidate received a number of votes sufficient to be elected to office, but for his or her death or disqualification, then the office will be regarded as vacant as of the time the newly elected official would have otherwise taken office.

**Sec. 27 was vetoed. See message at end of chapter.*

*Sec. 28. RCW 29A.28.040 and 2003 c 111 s 704 are each amended to read as follows:

(1) Whenever a vacancy occurs in the United States house of representatives or the United States senate from this state, the governor shall order a special election to fill the vacancy.

(2) Within ten days of such vacancy occurring, he or she shall issue a writ of election fixing a date for the special vacancy election not less than ninety days after the issuance of the writ, fixing a date for the primary for ((nominating)) qualifying candidates for the special vacancy election not less than thirty days before the day fixed for holding the special vacancy election, fixing the dates for the special filing period, and designating the term or part of the term for which the vacancy exists. If the vacancy is in the office of United States representative, the writ

of election shall specify the congressional district that is vacant.

(3) If the vacancy occurs less than six months before a state general election and before the second Friday following the close of the filing period for that general election, the special primary and special vacancy elections shall be held in concert with the state primary and state general election in that year.

(4) If the vacancy occurs on or after the first day for filing under RCW 29A.24.050 and on or before the second Friday following the close of the filing period, a special filing period of three normal business days shall be fixed by the governor and notice thereof given to all media, including press, radio, and television within the area in which the vacancy election is to be held, to the end that, insofar as possible, all interested persons will be aware of such filing period. The last day of the filing period shall not be later than the third Tuesday before the primary ((at which candidates are to be nominated)). The names of candidates who have filed valid declarations of candidacy during this three-day period shall appear on the approaching primary ballot.

(5) If the vacancy occurs later than the second Friday following the close of the filing period, a special primary and special vacancy election to fill the position shall be held after the next state general election but, in any event, no later than the ninetieth day following the November election.

**Sec. 28 was vetoed. See message at end of chapter.*

*Sec. 29. RCW 29A.28.060 and 2003 c 111 s 706 are each amended to read as follows:

The general election laws and laws relating to ((partisan)) primaries ((shall)) for partisan offices apply to the special primaries and vacancy elections provided for in RCW 29A.28.040 through 29A.28.050 to the extent that they are not inconsistent with the provisions of these sections. Statutory time deadlines relating to availability of absentee ballots, certification, canvassing, and related procedures that cannot be met in a timely fashion may be modified for the purposes of a specific primary or vacancy election under this chapter by the secretary of state through emergency rules adopted under RCW 29A.04.610.

**Sec. 29 was vetoed. See message at end of chapter.*

*Sec. 30. RCW 29A.32.030 and 2003 c 111 s 803 are each amended to read as follows:

The voters' pamphlet must contain:

(1) Information about each ballot measure initiated by or referred to the voters for their approval or rejection as required by RCW 29A.32.070;

(2) In even-numbered years, statements, if submitted, advocating the candidacies of ((nominees)) candidates qualified to appear on the ballot for the office of president and vice president of the United States, United States senator, United States representative, governor, lieutenant governor, secretary of state, state treasurer, state auditor, attorney general, commissioner of public lands, superintendent of public instruction, insurance commissioner, state senator, state representative, justice of the supreme court, judge of the court of appeals, or judge of the superior court. Candidates

may also submit a campaign mailing address and telephone number and a photograph not more than five years old and of a size and quality that the secretary of state determines to be suitable for reproduction in the voters' pamphlet;

(3) In odd-numbered years, if any office voted upon statewide appears on the ballot due to a vacancy, then statements and photographs for candidates for any vacant office listed in subsection (2) of this section must appear;

(4) In even-numbered years, a section explaining how voters may participate in the election campaign process; the address and telephone number of the public disclosure commission established under RCW 42.17.350; and a summary of the disclosure requirements that apply when contributions are made to candidates and political committees;

(5) In even-numbered years the name, address, and telephone number of each political party ((with nominees listed in the pamphlet, if filed with the secretary of state by the state committee of a major political party or the presiding officer of the convention of a minor political party)) for which a candidate appearing on the ballot has expressed a preference on his or her declaration of candidacy, if the party has provided that information to the secretary of state;

(6) In each odd-numbered year immediately before a year in which a president of the United States is to be nominated and elected, information explaining the precinct caucus and convention process used by each major political party to elect

delegates to its national presidential candidate nominating convention. The pamphlet must also provide a description of the statutory procedures by which minor political parties are formed and the statutory methods used by the parties to nominate candidates for president;

(7) In even-numbered years, a description of the office of precinct committee officer and its duties;

(8) An application form for an absentee ballot;

(9) A brief statement explaining the deletion and addition of language for proposed measures under RCW 29A.32.080;

(10) Any additional information pertaining to elections as may be required by law or in the judgment of the secretary of state is deemed informative to the voters.

**Sec. 30 was vetoed. See message at end of chapter.*

*Sec. 31. RCW 29A.32.120 and 2003 c 254 s 6 and 2003 c 111 s 812 are each reenacted and amended to read as follows:

(1) The maximum number of words for statements submitted by candidates is as follows: State representative, one hundred words; state senator, judge of the superior court, judge of the court of appeals, justice of the supreme court, and all state offices voted upon throughout the state, except that of governor, two hundred words; president and vice president, United States senator, United States representative, and governor, three hundred words.

(2) Arguments written by committees under RCW 29A.32.060 may not exceed two hundred fifty words in length.

(3) Rebuttal arguments written by committees may not exceed seventy-five words in length.

(4) The secretary of state shall allocate space in the pamphlet based on the number of candidates ((or nominees)) for each office.

**Sec. 31 was vetoed. See message at end of chapter.*

*Sec. 32. RCW 29A.36.010 and 2003 c 111 s 901 are each amended to read as follows:

On or before the day following the last day allowed for ((political parties to fill vacancies in the ticket as provided by RCW 29A.28.010)) candidates to withdraw under RCW 29A.24.130, the secretary of state shall certify to each county auditor a list of the candidates who have filed declarations of candidacy in his or her office for the primary. For each office, the certificate shall include the name of each candidate, his or her address, and his or her party ((designation)) preference, if any.

**Sec. 32 was vetoed. See message at end of chapter.*

*Sec. 33. RCW 29A.36.070 and 2003 c 111 s 907 are each amended to read as follows:

(1) Except as provided to the contrary in RCW 82.14.036, 82.46.021, or 82.80.090, the ballot title of any referendum filed on an enactment or portion of an enactment of a local government and any other question submitted to the voters of a local government consists of three elements: (a) An identification of the enacting legislative body and a statement of the subject matter; (b) a concise description of the measure; and (c) a question. The ballot title must conform with the requirements and be displayed substantially as provided under RCW 29A.72.050, except that the concise description must

not exceed seventy-five words. If the local governmental unit is a city or a town, the concise statement shall be prepared by the city or town attorney. If the local governmental unit is a county, the concise statement shall be prepared by the prosecuting attorney of the county. If the unit is a unit of local government other than a city, town, or county, the concise statement shall be prepared by the prosecuting attorney of the county within which the majority area of the unit is located.

(2) A referendum measure on the enactment of a unit of local government shall be advertised in the manner provided for ((nominees)) candidates for elective office.

(3) Subsection (1) of this section does not apply if another provision of law specifies the ballot title for a specific type of ballot question or proposition.

**Sec. 33 was vetoed. See message at end of chapter.*

*Sec. 34. RCW 29A.36.100 and 2003 c 111 s 910 are each amended to read as follows:

Except for the candidates for the positions of president and vice president or for a partisan or nonpartisan office for which no primary is required, the names of all candidates who, under this title, filed a declaration of candidacy ((, were certified as a candidate to fill a vacancy on a major party ticket, or were nominated as an independent or minor party candidate)) will appear on the appropriate ballot at the primary throughout the jurisdiction ((in which they are to be nominated)) of the office for which they are a candidate.

**Sec. 34 was vetoed. See message at end of chapter.*

*Sec. 35. RCW 29A.36.170 and 2003 c 111 s 917 are each amended to read as follows:

(1) Except as provided in RCW 29A.36.180 and in subsection (2) of this section, on the ballot at the general election for ((a nonpartisan)) an office for which a primary was held, only the names of the candidate who received the greatest number of votes and the candidate who received the next greatest number of votes for that office shall appear under the title of that office, and the names shall appear in that order. If a primary was conducted, no candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding primary. On the ballot at the general election for ((any other nonpartisan)) an office for which no primary was held, the names of the candidates shall be listed in the order determined under RCW 29A.36.130.

(2) On the ballot at the general election for the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed under the title of the office for that position.

*_Sec. 35 was vetoed. See message at end of chapter._

*Sec. 36. RCW 29A.36.200 and 2003 c 111 s 920 are each amended to read as follows:

The names of the persons certified ((as nominees)) by the secretary of state or the county canvassing board as having qualified to appear on

the general election ballot shall be printed on the ballot at the ensuing election.

No name of any candidate ((whose nomination at a primary is required by law shall)) for an office for which a primary is conducted may be placed upon the ballot at a general or special election unless it appears upon the certificate of either (1) the secretary of state ((,)) or (2) the county canvassing board ((, or (3) a minor party convention or the state or county central committee of a major political party to fill a vacancy on its ticket under RCW 29A.28.020)).

Excluding the office of precinct committee officer or a temporary elected position such as a charter review board member or freeholder, a candidate's name shall not appear more than once upon a ballot for a position regularly ((nominated or)) elected at the same election.

**Sec. 36 was vetoed. See message at end of chapter.*

*Sec. 37. RCW 29A.52.010 and 2003 c 111 s 1301 are each amended to read as follows:

Whenever it shall be necessary to hold a special election in an odd-numbered year to fill an unexpired term of any office which is scheduled to be voted upon for a full term in an even-numbered year, no ((September)) primary election shall be held in the odd-numbered year if, after the last day allowed for candidates to withdraw ((, either of the following circumstances exist:

(1) No more than one candidate of each qualified political party has filed a declaration of candidacy for the same partisan office to be filled; or

(2))) no more than two candidates have filed a declaration of candidacy for a single ((nonpartisan)) office to be filled.

In ((either)) this event, the officer with whom the declarations of candidacy were filed shall immediately notify all candidates concerned and the names of the candidates that would have been printed upon the ((September)) primary ballot, but for the provisions of this section, shall be printed as ((nominees)) candidates for the positions sought upon the ((November)) general election ballot.

Sec. 37 was vetoed. See message at end of chapter.

*Sec. 38. RCW 29A.52.110 and 2003 c 111 s 1302 are each amended to read as follows:

Candidates for ((the following offices shall be nominated at)) partisan offices will appear on the ballot at primaries held ((pursuant to the provisions of)) under this chapter ((:

(1) Congressional offices;

(2) All state offices except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices where a county home rule charter provides otherwise)).

Sec. 38 was vetoed. See message at end of chapter.

***NEW SECTION.** Sec. 39. A new section is added to chapter 29A.52 RCW to read as follows:

(1) Whenever candidates for partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter, except as

otherwise provided in law. Based upon votes cast at the primary, two candidates must be certified as qualified to appear on the general election ballot, under RCW 29A.52.320 and 29A.36.170.

(2) A primary may not be used to select the nominees of a political party. A primary is a critical stage in the public process by which voters elect candidates to public office.

(3) If a candidate indicates a political philosophy as provided by RCW 29A.24.030(3) on his or her declaration of candidacy, then the philosophy will be listed for the candidate on the primary and general election ballots. Each candidate who does not express a philosophy will be listed as an independent candidate on the primary and general election ballots. Political philosophy will be listed for the information of the voters only, and may not be used for any purpose relating to the conduct, canvassing, or certification of the primary, and may in no way limit the options available to voters in deciding for whom to cast a vote.

**Sec. 39 was vetoed. See message at end of chapter.*

*Sec 40. RCW 29A.52.230 and 2003 c 111 s 1307 are each amended to read as follows:

The offices of superintendent of public instruction, justice of the supreme court, judge of the court of appeals, judge of the superior court, and judge of the district court shall be nonpartisan and the candidates therefor shall be ((nominated)) qualified and elected as such.

All city, town, and special purpose district elective offices shall be nonpartisan and the

candidates therefor shall be ((nominated)) qualified and elected as such.

**Sec. 40 was vetoed. See message at end of chapter.*

*Sec. 41. RCW 29A.52.320 and 2003 c 111 s 1310 are each amended to read as follows:

No later than the day following the certification of the returns of any primary, the secretary of state shall certify to the appropriate county auditors, the names of all persons ((nominated)) qualified to appear on the general election ballot as candidates for offices, the returns of which have been canvassed by the secretary of state.

**Sec. 41 was vetoed. See message at end of chapter.*

*Sec. 42. RCW 29A.52.350 and 2003 c 111 s 1313 are each amended to read as follows:

Except as provided in RCW 29A.32.260, notice for any state, county, district, or municipal election, whether special or general, must be given by at least one publication not more than ten nor less than three days before the election by the county auditor or the officer conducting the election as the case may be, in one or more newspapers of general circulation within the county. The legal notice must contain the title of each office under the proper party ((designation)) preference, the names and addresses of all ((officers)) candidates who have been ((nominated)) qualified to appear on the ballot for an office to be voted upon at that election, together with the ballot titles of all measures, the hours during which the polls will be open, and the polling places for each precinct, giving the address of each polling place. The names of all candidates for nonpartisan offices must be published separately with designation of the offices for which

they are candidates but without party designation. This is the only notice required for a state, county, district, or municipal general or special election and supersedes the provisions of any and all other statutes, whether general or special in nature, having different requirements for the giving of notice of any general or special elections.

Sec. 42 was vetoed. See message at end of chapter.

*Sec. 43. RCW 29A.60.020 and 2003 c 111 s 1502 are each amended to read as follows:

(1) For any office at any election or primary, any voter may write in on the ballot the name of any person for an office who has filed as a write-in candidate for the office in the manner provided by RCW 29A.24.310 and such vote shall be counted the same as if the name had been printed on the ballot and marked by the voter. No write-in vote made for any person who has not filed a declaration of candidacy pursuant to RCW 29A.24.310 is valid if that person filed for the same office, either as a regular candidate or a write-in candidate, at the preceding primary. Any abbreviation used to designate office, position, or political party shall be accepted if the canvassing board can determine, to their satisfaction, the voter's intent.

(2) The number of write-in votes cast for each office must be recorded and reported with the canvass for the election.

(3) Write-in votes cast for an individual candidate for an office need not be tallied if the total number of write-in votes cast for the office is not greater than the number of votes cast for the candidate apparently ((nominated)) qualified to

appear on the general election ballot or elected, and the write-in votes could not have altered the outcome of the primary or election. In the case of write-in votes for statewide office or for any office whose jurisdiction encompasses more than one county, write-in votes for an individual candidate must be tallied whenever the county auditor is notified by either the office of the secretary of state or another auditor in a multicounty jurisdiction that it appears that the write-in votes could alter the outcome of the primary or election.

(4) In the case of statewide offices or jurisdictions that encompass more than one county, if the total number of write-in votes cast for an office within a county is greater than the number of votes cast for a candidate apparently ((nominated)) qualified to appear on the general election ballot or elected in a primary or election, the auditor shall tally all write-in votes for individual candidates for that office and notify the office of the secretary of state and the auditors of the other counties within the jurisdiction, that the write-in votes for individual candidates should be tallied.

**Sec. 43 was vetoed. See message at end of chapter.*

*Sec. 44. RCW 29A.60.220 and 2003 c 111 s 1522 are each amended to read as follows:

(1) If the requisite number of any federal, state, county, city, or district offices have not ((been nominated)) qualified to appear on the general election ballot in a primary by reason of two or more persons having an equal and requisite number of votes for being placed on the general election ballot, the official empowered by state law to certify

candidates for the general election ballot shall give notice to the several persons so having the equal and requisite number of votes to attend at the appropriate office at the time designated by that official, who shall then and there proceed publicly to decide by lot which of those persons will be declared ((nominated)) qualified and placed on the general election ballot.

(2) If the requisite number of any federal, state, county, city, district, or precinct officers have not been elected by reason of two or more persons having an equal and highest number of votes for one and the same office, the official empowered by state law to issue the original certificate of election shall give notice to the several persons so having the highest and equal number of votes to attend at the appropriate office at the time to be appointed by that official, who shall then and there proceed publicly to decide by lot which of those persons will be declared duly elected, and the official shall make out and deliver to the person thus duly declared elected a certificate of election.

**Sec. 44 was vetoed. See message at end of chapter.*

*Sec. 45. RCW 29A.64.010 and 2003 c 111 s 1601 are each amended to read as follows:

An officer of a political party or any person for whom votes were cast in a primary who was not declared ((nominated)) qualified to appear on the general election ballot may file a written application for a recount of the votes or a portion of the votes cast at that primary for all persons for whom votes were cast for ((nomination to)) that office.

An officer of a political party or any person for whom votes were cast at any election may file a written application for a recount of the votes or a portion of the votes cast at that election for all candidates for election to that office.

Any group of five or more registered voters may file a written application for a recount of the votes or a portion of the votes cast upon any question or issue. They shall designate one of the members of the group as chair and shall indicate the voting residence of each member of the group.

An application for a recount of the votes cast for an office or on a ballot measure must be filed with the officer with whom filings are made for the jurisdiction.

An application for a recount must specify whether the recount will be done manually or by the vote tally system. A recount done by the vote tally system must use programming that recounts and reports only the office or ballot measure in question. The county shall also provide for a test of the logic and accuracy of that program.

An application for a recount must be filed within three business days after the county canvassing board or secretary of state has declared the official results of the primary or election for the office or issue for which the recount is requested.

This chapter applies to the recounting of votes cast by paper ballots and to the recounting of votes recorded on ballots counted by a vote tally system.

**Sec. 45 was vetoed. See message at end of chapter.*

*Sec. 46. RCW 29A.64.020 and 2003 c 111 s 1602 are each amended to read as follows:

(1) If the official canvass of all of the returns for any office at any primary or election reveals that the difference in the number of votes cast for a candidate apparently ((nominated)) qualified to appear on the general election ballot or elected to any office and the number of votes cast for the closest apparently defeated opponent is less than two thousand votes and also less than one-half of one percent of the total number of votes cast for both candidates, the county canvassing board shall conduct a recount of all votes cast on that position.

(a) Whenever such a difference occurs in the number of votes cast for candidates for a position the declaration of candidacy for which was filed with the secretary of state, the secretary of state shall, within three business days of the day that the returns of the primary or election are first certified by the canvassing boards of those counties, direct those boards to recount all votes cast on the position.

(b) If the difference in the number of votes cast for the apparent winner and the closest apparently defeated opponent is less than one hundred fifty votes and also less than one-fourth of one percent of the total number of votes cast for both candidates, the votes shall be recounted manually or as provided in subsection (3) of this section.

(2) A mandatory recount shall be conducted in the manner provided by RCW 29A.64.030, 29A.64.040, and 29A.64.060. No cost of a mandatory recount may be charged to any candidate.

(3) The apparent winner and closest apparently defeated opponent for an office for which a manual recount is required under subsection (1)(b) of this section may select an alternative method of conducting the recount. To select such an alternative, the two candidates shall agree to the alternative in a signed, written statement filed with the election official for the office. The recount shall be conducted using the alternative method if: It is suited to the balloting system that was used for casting the votes for the office; it involves the use of a vote tallying system that is approved for use in this state by the secretary of state; and the vote tallying system is readily available in each county required to conduct the recount. If more than one balloting system was used in casting votes for the office, an alternative to a manual recount may be selected for each system.

**Sec. 46 was vetoed. See message at end of chapter.*

*Sec. 47. RCW 29A.64.040 and 2003 c 111 s 1604 are each amended to read as follows:

(1) At the time and place established for a recount, the canvassing board or its duly authorized representatives, in the presence of all witnesses who may be in attendance, shall open the sealed containers containing the ballots to be recounted, and shall recount the votes for the offices or issues for which the recount has been ordered. Ballots shall be handled only by the members of the canvassing board or their duly authorized representatives.

Witnesses shall be permitted to observe the ballots and the process of tabulating the votes, but they shall not be permitted to handle the ballots. The canvassing board shall not permit the tabulation of

votes for any ((nomination, election,)) office or issue other than the ones for which a recount was applied for or required.

(2) At any time before the ballots from all of the precincts listed in the application for the recount have been recounted, the applicant may file with the board a written request to stop the recount.

(3) The recount may be observed by persons representing the candidates affected by the recount or the persons representing both sides of an issue that is being recounted. The observers may not make a record of the names, addresses, or other information on the ballots, poll books, or applications for absentee ballots unless authorized by the superior court. The secretary of state or county auditor may limit the number of observers to not less than two on each side if, in his or her opinion, a greater number would cause undue delay or disruption of the recount process.

**Sec. 47 was vetoed. See message at end of chapter.*

*Sec. 48. RCW 29A.64.060 and 2003 c 111 s 1606 are each amended to read as follows:

Upon completion of the canvass of a recount, the canvassing board shall prepare and certify an amended abstract showing the votes cast in each precinct for which the recount was conducted. Copies of the amended abstracts must be transmitted to the same officers who received the abstract on which the recount was based.

If the ((nomination, election,)) office or issue for which the recount was conducted was submitted only to the voters of a county, the canvassing board

shall file the amended abstract with the original results of that election or primary.

If the ((nomination, election,)) office or issue for which a recount was conducted was submitted to the voters of more than one county, the secretary of state shall canvass the amended abstracts and shall file an amended abstract with the original results of that election. An amended abstract certified under this section supersedes any prior abstract of the results for the same offices or issues at the same primary or election.

**Sec. 48 was vetoed. See message at end of chapter.*

*Sec. 49. RCW 29A.64.080 and 2003 c 111 s 1608 are each amended to read as follows:

The canvassing board shall determine the expenses for conducting a recount of votes.

The cost of the recount shall be deducted from the amount deposited by the applicant for the recount at the time of filing the request for the recount, and the balance shall be returned to the applicant. If the costs of the recount exceed the deposit, the applicant shall pay the difference. No charges may be deducted by the canvassing board from the deposit for a recount if the recount changes the result of the ((nomination)) primary or election for which the recount was ordered.

**Sec. 49 was vetoed. See message at end of chapter.*

*Sec. 50. RCW 29A.68.010 and 2003 c 111 s 1701 are each amended to read as follows:

Any justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper county shall, by order, require any person

charged with error, wrongful act, or neglect to forthwith correct the error, desist from the wrongful act, or perform the duty and to do as the court orders or to show cause forthwith why the error should not be corrected, the wrongful act desisted from, or the duty or order not performed, whenever it is made to appear to such justice or judge by affidavit of an elector that:

(1) An error or omission has occurred or is about to occur in printing the name of any candidate on official ballots; or

(2) An error other than as provided in subsections (1) and (3) of this section has been committed or is about to be committed in printing the ballots; or

(3) The name of any person has been or is about to be wrongfully placed upon the ballots; or

(4) A wrongful act other than as provided for in subsections (1) and (3) of this section has been performed or is about to be performed by any election officer; or

(5) Any neglect of duty on the part of an election officer other than as provided for in subsections (1) and (3) of this section has occurred or is about to occur; or

(6) An error or omission has occurred or is about to occur in the issuance of a certificate of election.

An affidavit of an elector under subsections (1) and (3) above when relating to a primary election must be filed with the appropriate court no later than the second Friday following the closing of the

filing period ((for nominations)) for such office and shall be heard and finally disposed of by the court not later than five days after the filing thereof. An affidavit of an elector under subsections (1) and (3) of this section when relating to a general election must be filed with the appropriate court no later than three days following the official certification of the primary election returns and shall be heard and finally disposed of by the court not later than five days after the filing thereof. An affidavit of an elector under subsection (6) of this section shall be filed with the appropriate court no later 13 than ten days following the issuance of a certificate of election.

**Sec. 50 was vetoed. See message at end of chapter.*

*Sec. 51. RCW 29A.80.010 and 2003 c 111 s 2001 are each amended to read as follows:

(((1))) Each political party organization may ((:

(a) Make its own)) adopt rules ((and regulations; and

(b) Perform all functions inherent in such an organization.

(2) Only major political parties may designate candidates to appear on the state primary ballot as provided in RCW 29A.28.010)) governing its own organization and the nonstatutory functions of that organization.

**Sec. 51 was vetoed. See message at end of chapter.*

*Sec. 52. RCW 29A.84.260 and 2003 c 111 s 2114 are each amended to read as follows:

The following apply to persons signing ((nominating)) petitions prescribed by RCW 29A.20.150 and 29A.24.100:

(1) A person who signs a petition with any other than his or her name shall be guilty of a misdemeanor.

(2) A person shall be guilty of a misdemeanor if the person knowingly: Signs more than one petition for any single candidacy of any single candidate; signs the petition when he or she is not a legal voter; or makes a false statement as to his or her residence.

**Sec. 52 was vetoed. See message at end of chapter.*

*Sec. 53. RCW 29A.84.310 and 2003 c 111 s 2117 are each amended to read as follows:

Every person who:

(1) Knowingly provides false information on his or her declaration of candidacy ((or)), filing petition ((of nomination)), or nominating petition; or

(2) Conceals or fraudulently defaces or destroys a certificate that has been filed with an elections officer under RCW ((29A.20.110 through 29A.20.200)) 29A.20.120 through 29A.20.180 or a declaration of candidacy or petition of nomination that has been filed with an elections officer, or any part of such a certificate, declaration, or petition, is guilty of a class C felony punishable under RCW 9A.20.021.

**Sec. 53 was vetoed. See message at end of chapter.*

*Sec. 54. RCW 29A.84.710 and 2003 c 111 s 2137 are each amended to read as follows:

Every person who:

(1) Knowingly and falsely issues a certificate of ((nomination)) qualification or election; or

(2) Knowingly provides false information on a certificate which must be filed with an elections officer under RCW ((29A.20.110 through 29A.20.200)) 29A.20.120 through 29A.20.180, is guilty of a class C felony punishable under RCW 9A.20.021.

Sec. 54 was vetoed. See message at end of chapter.

*Sec. 55. RCW 42.17.020 and 2002 c 75 s 1 are each amended to read as follows:

(1) "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

(2) "Authorized committee" means the political committee authorized by a candidate, or by the public official against whom recall charges have been filed, to accept contributions or make expenditures on behalf of the candidate or public official.

(3) "Ballot proposition" means any "measure" as defined by RCW ((29.01.110)) 29A.04.091, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency prior to its circulation for signatures.

(4) "Benefit" means a commercial, proprietary, financial, economic, or monetary advantage, or the avoidance of a commercial, proprietary, financial, economic, or monetary disadvantage.

(5) "Bona fide political party" means:

(a) An organization that has filed a valid certificate of nomination with the secretary of state under chapter ((29.24)) 29A.20 RCW;

(b) The governing body of the state organization of a major political party, as defined in RCW ((29.01.090)) 29A.04.085, that is the body authorized by the charter or bylaws of the party to exercise authority on behalf of the state party; or

(c) The county central committee or legislative district committee of a major political party. There may be only one legislative district committee for each party in each legislative district.

(6) "Depository" means a bank designated by a candidate or political committee pursuant to RCW 42.17.050.

(7) "Treasurer" and "deputy treasurer" mean the individuals appointed by a candidate or political committee, pursuant to RCW 42.17.050, to perform the duties specified in that section.

(8) "Candidate" means any individual who seeks nomination for election or election to public office. An individual seeks nomination or election when he or she first:

(a) Receives contributions or makes expenditures or reserves space or facilities with intent to promote his or her candidacy for office;

(b) Announces publicly or files for office;

(c) Purchases commercial advertising space or broadcast time to promote his or her candidacy; or

(d) Gives his or her consent to another person to take on behalf of the individual any of the actions in (a) or (c) of this subsection.

(9) "Caucus political committee" means a political committee organized and maintained by the members of ((a major political party in)) the majority caucus in the state senate or state house of representatives, or by the members of the minority caucus in the state senate or state house of representatives.

(10) "Commercial advertiser" means any person who sells the service of communicating messages or producing printed material for broadcast or distribution to the general public or segments of the general public whether through the use of newspapers, magazines, television and radio stations, billboard companies, direct mail advertising companies, printing companies, or otherwise.

(11) "Commission" means the agency established under RCW 42.17.350.

(12) "Compensation" unless the context requires a narrower meaning, includes payment in any form for real or personal property or services of any kind: PROVIDED, That for the purpose of compliance with RCW 42.17.241, the term "compensation" shall not include per diem allowances or other payments made by a governmental entity to reimburse a public official for

expenses incurred while the official is engaged in the official business of the governmental entity.

(13) "Continuing political committee" means a political committee that is an organization of continuing existence not established in anticipation of any particular election campaign.

(14)(a) "Contribution" includes:

(i) A loan, gift, deposit, subscription, forgiveness of indebtedness, donation, advance, pledge, payment, transfer of funds between political committees, or anything of value, including personal and professional services for less than full consideration;

(ii) An expenditure made by a person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a political committee, or their agents;

(iii) The financing by a person of the dissemination, distribution, or republication, in whole or in part, of broadcast, written, graphic, or other form of political advertising prepared by a candidate, a political committee, or its authorized agent;

(iv) Sums paid for tickets to fund-raising events such as dinners and parties, except for the actual cost of the consumables furnished at the event.

(b) "Contribution" does not include:

(i) Standard interest on money deposited in a political committee's account;

(ii) Ordinary home hospitality;

(iii) A contribution received by a candidate or political committee that is returned to the contributor within five business days of the date on which it is received by the candidate or political committee;

(iv) A news item, feature, commentary, or editorial in a regularly scheduled news medium that is of primary interest to the general public, that is in a news medium controlled by a person whose business is that news medium, and that is not controlled by a candidate or a political committee;

(v) An internal political communication primarily limited to the members of or contributors to a political party organization or political committee, or to the officers, management staff, or stockholders of a corporation or similar enterprise, or to the members of a labor organization or other membership organization;

(vi) The rendering of personal services of the sort commonly performed by volunteer campaign workers, or incidental expenses personally incurred by volunteer campaign workers not in excess of fifty dollars personally paid for by the worker. "Volunteer services," for the purposes of this section, means services or labor for which the individual is not compensated by any person;

(vii) Messages in the form of reader boards, banners, or yard or window signs displayed on a person's own property or property occupied by a person. However, a facility used for such political advertising for which a rental charge is normally made must be reported as an in-kind contribution

and counts towards any applicable contribution limit of the person providing the facility;

(viii) Legal or accounting services rendered to or on behalf of:

(A) A political party or caucus political committee if the person paying for the services is the regular employer of the person rendering such services; or

(B) A candidate or an authorized committee if the person paying for the services is the regular employer of the individual rendering the services and if the services are solely for the purpose of ensuring compliance with state election or public disclosure laws.

(c) Contributions other than money or its equivalent are deemed to have a monetary value equivalent to the fair market value of the contribution. Services or property or rights furnished at less than their fair market value for the purpose of assisting any candidate or political committee are deemed a contribution. Such a contribution must be reported as an in-kind contribution at its fair market value and counts towards any applicable contribution limit of the provider.

(15) "Elected official" means any person elected at a general or special election to any public office, and any person appointed to fill a vacancy in any such office.

(16) "Election" includes any primary, general, or special election for public office and any election in which a ballot proposition is submitted to the voters: PROVIDED, That an election in which the

qualifications for voting include other than those requirements set forth in Article VI, section 1 (Amendment 63) of the Constitution of the state of Washington shall not be considered an election for purposes of this chapter.

(17) "Election campaign" means any campaign in support of or in opposition to a candidate for election to public office and any campaign in support of, or in opposition to, a ballot proposition.

(18) "Election cycle" means the period beginning on the first day of December after the date of the last previous general election for the office that the candidate seeks and ending on November 30th after the next election for the office. In the case of a special election to fill a vacancy in an office, "election cycle" means the period beginning on the day the vacancy occurs and ending on November 30th after the special election.

(19) "Expenditure" includes a payment, contribution, subscription, distribution, loan, advance, deposit, or gift of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure. The term "expenditure" also includes a promise to pay, a payment, or a transfer of anything of value in exchange for goods, services, property, facilities, or anything of value for the purpose of assisting, benefiting, or honoring any public official or candidate, or assisting in furthering or opposing any election campaign. For the purposes of this chapter, agreements to make expenditures, contracts, and promises to pay may be reported as estimated obligations until actual payment is made.

The term "expenditure" shall not include the partial or complete repayment by a candidate or political committee of the principal of a loan, the receipt of which loan has been properly reported.

(20) "Final report" means the report described as a final report in RCW 42.17.080(2).

(21) "General election" for the purposes of RCW 42.17.640 means the election that results in the election of a person to a state office. It does not include a primary.

(22) "Gift," is as defined in RCW 42.52.010.

(23) "Immediate family" includes the spouse, dependent children, and other dependent relatives, if living in the household. For the purposes of RCW 42.17.640 through 42.17.790, "immediate family" means an individual's spouse, and child, stepchild, grandchild, parent, stepparent, grandparent, brother, half brother, sister, or half sister of the individual and the spouse of any such person and a child, stepchild, grandchild, parent, stepparent, grandparent, brother, half brother, sister, or half sister of the individual's spouse and the spouse of any such person.

(24) "Independent expenditure" means an expenditure that has each of the following elements:

(a) It is made in support of or in opposition to a candidate for office by a person who is not (i) a candidate for that office, (ii) an authorized committee of that candidate for that office, (iii) a person who has received the candidate's encouragement or approval to make the expenditure, if the expenditure pays in whole or in part for political advertising

supporting that candidate or promoting the defeat of any other candidate or candidates for that office, or (iv) a person with whom the candidate has collaborated for the purpose of making the expenditure, if the expenditure pays in whole or in part for political advertising supporting that candidate or promoting the defeat of any other candidate or candidates for that office;

(b) The expenditure pays in whole or in part for political advertising that either specifically names the candidate supported or opposed, or clearly and beyond any doubt identifies the candidate without using the candidate's name; and

(c) The expenditure, alone or in conjunction with another expenditure or other expenditures of the same person in support of or opposition to that candidate, has a value of five hundred dollars or more. A series of expenditures, each of which is under five hundred dollars, constitutes one independent expenditure if their cumulative value is five hundred dollars or more.

(25)(a) "Intermediary" means an individual who transmits a contribution to a candidate or committee from another person unless the contribution is from the individual's employer, immediate family as defined for purposes of RCW 42.17.640 through 42.17.790, or an association to which the individual belongs.

(b) A treasurer or a candidate is not an intermediary for purposes of the committee that the treasurer or candidate serves.

(c) A professional fund-raiser is not an intermediary if the fund-raiser is compensated for fund-raising services at the usual and customary rate.

(d) A volunteer hosting a fund-raising event at the individual's home is not an intermediary for purposes of that event.

(26) "Legislation" means bills, resolutions, motions, amendments, nominations, and other matters pending or proposed in either house of the state legislature, and includes any other matter that may be the subject of action by either house or any committee of the legislature and all bills and resolutions that, having passed both houses, are pending approval by the governor.

(27) "Lobby" and "lobbying" each mean attempting to influence the passage or defeat of any legislation by the legislature of the state of Washington, or the adoption or rejection of any rule, standard, rate, or other legislative enactment of any state agency under the state Administrative Procedure Act, chapter 34.05 RCW. Neither "lobby" nor "lobbying" includes an association's or other organization's act of communicating with the members of that association or organization.

(28) "Lobbyist" includes any person who lobbies either in his or her own or another's behalf.

(29) "Lobbyist's employer" means the person or persons by whom a lobbyist is employed and all persons by whom he or she is compensated for acting as a lobbyist.

(30) "Person" includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency however constituted, candidate, committee, political committee, political party, executive committee thereof, or any other organization or group of persons, however organized.

(31) "Person in interest" means the person who is the subject of a record or any representative designated by that person, except that if that person is under a legal disability, the term "person in interest" means and includes the parent or duly appointed legal representative.

(32) "Political advertising" includes any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support in any election campaign.

(33) "Political committee" means any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.

(34) "Primary" for the purposes of RCW 42.17.640 means the procedure for ((nominating)) qualifying a candidate to state office under chapter ((29.18 or 29.21 RCW or any other primary for an election that uses, in large measure, the procedures established in chapter 29.18 or 29.21)) 29A.52 RCW.

(35) "Public office" means any federal, state, county, city, town, school district, port district, special district, or other state political subdivision elective office.

(36) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

(37) "Recall campaign" means the period of time beginning on the date of the filing of recall charges under RCW ((29.82.015)) 29A.56.120 and ending thirty days after the recall election.

(38) "State legislative office" means the office of a member of the state house of representatives or the office of a member of the state senate.

(39) "State office" means state legislative office or the office of governor, lieutenant governor, secretary of state, attorney general, commissioner of public lands, insurance commissioner, superintendent of public instruction, state auditor, or state treasurer.

(40) "State official" means a person who holds a state office.

(41) "Surplus funds" mean, in the case of a political committee or candidate, the balance of contributions that remain in the possession or control of that committee or candidate subsequent to the election for which the contributions were received, and that are in excess of the amount necessary to pay remaining debts incurred by the committee or candidate prior to that election. In the case of a continuing political committee, "surplus funds" mean those contributions remaining in the possession or control of the committee that are in excess of the amount necessary to pay all remaining debts when it makes its final report under RCW 42.17.065.

(42) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

As used in this chapter, the singular shall take the plural and any gender, the other, as the context requires.

**Sec. 55 was vetoed. See message at end of chapter.*

***NEW SECTION.** Sec. 56. (1) The subheadings in chapter 29A.52 RCW "PARTISAN PRIMARIES" AND "NONPARTISAN PRIMARIES" will be combined under one subheading "PRIMARIES."

(2) The subheading in chapter 29A.20 RCW "MINOR PARTY AND INDEPENDENT CANDIDATE NOMINATIONS" will be changed to "MINOR AND INDEPENDENT PRESIDENTIAL CANDIDATES."

(3) The code reviser shall recaption RCW 29A.24.100 as "Filing petition--Form."

(4) The code reviser shall recaption RCW 29A.36.170 as "Candidates qualified for the general election."

(5) The code reviser shall recaption RCW 29A.52.320 as "Certification of candidates qualified to appear on the general election ballot."

(6) The code reviser shall recaption RCW 29A.84.310 as "Candidacy declarations, filing petitions, nominating petitions."

(7) The code reviser shall recaption RCW 29A.84.710 as "Documents regarding qualification, election, candidacy--Frauds and falsehoods."

**Sec. 56 was vetoed. See message at end of chapter.*

***NEW SECTION.** Sec. 57. The following acts or parts of acts are each repealed:

(1) RCW 29A.04.157 (September primary) and 2003 c 111 s 128;

(2) RCW 29A.20.110 (Definitions--"Convention" and "election jurisdiction") and 2003 c

111 s 505, 1977 ex.s. c 329 s 1, & 1965 c 9 s 29.24.010;

(3) RCW 29A.20.130 (Convention--Notice) and 2003 c 111 s 507;

(4) RCW 29A.20.200 (Declarations of candidacy required, exceptions--Payment of fees) and 2003 c 111 s 514, 1990 c 59 s 103, 1989 c 215 s 8, 1977 ex.s. c 329 s 7, & 1965 c 9 s 29.24.070;

(5) RCW 29A.24.200 (Lapse of election when no filing for single positions--Effect) and 2003 c 111 s 620;

(6) RCW 29A.24.210 (Vacancy in partisan elective office—Special filing period) and 2003 c 111 s 621;

(7) RCW 29A.28.010 (Major party ticket) and 2003 c 111 s 701, 1990 c 59 s 102, 1977 ex.s. c 329 s 12, & 1965 c 9 s 29.18.150;

(8) RCW 29A.28.020 (Death or disqualification--Correcting ballots--Counting votes already cast) and 2003 c 111 s 702, 2001 c 46 s 4, & 1977 ex.s. c 329 s 13;

(9) RCW 29A.36.190 (Partisan candidates qualified for general election) and 2003 c 111 s 919;

(10) RCW 29A.52.130 (Blanket primary authorized) and 2003 c 111 s 304; and

(11) RCW 29A.04.903 (Effective date--2003 c 111) and 2003 c 111 s 2405.

**Sec. 57 was vetoed. See message at end of chapter.*

PART 2 - NOMINATING PRIMARY

***NEW SECTION.** Sec. 101. A new section is added to chapter 29A.52 RCW to read as follows:

If a court of competent jurisdiction holds that a candidate may not identify a major or minor political party as best approximating his or her political philosophy, as provided in RCW 29A.24.030(3), and all appeals of that court order have been exhausted or waived, the secretary of state shall notify the governor, the majority and minority leaders of the two largest caucuses in the senate and the house of representatives, the code reviser, and all county auditors that the state can no longer conduct a qualifying primary and instead will conduct a nominating primary. Upon issuance of such a notification by the secretary of state, no qualifying primary may be held in Washington.

**Sec. 101 was vetoed. See message at end of chapter.*

NEW SECTION. Sec. 102. A new section is added to chapter 29A.04 RCW to read as follows:

As used in this title:

(1) "Ballot" means, as the context implies, either:

(a) The issues and offices to be voted upon in a jurisdiction or portion of a jurisdiction at a particular primary, general election, or special election;

(b) A facsimile of the contents of a particular ballot whether printed on a paper ballot or ballot card or as part of a voting machine or voting device;

(c) A physical or electronic record of the choices of an individual voter in a particular primary, general election, or special election; or

(d) The physical document on which the voter's choices are to be recorded;

(2) "Paper ballot" means a piece of paper on which the ballot for a particular election or primary has been printed, on which a voter may record his or her choices for any candidate or for or against any measure, and that is to be tabulated manually;

(3) "Ballot card" means any type of card or piece of paper of any size on which a voter may record his or her choices for any candidate and for or against any measure and that is to be tabulated on a vote tallying system;

(4) "Sample ballot" means a printed facsimile of all the issues and offices on the ballot in a jurisdiction and is intended to give voters notice of the issues, offices, and candidates that are to be voted on at a particular primary, general election, or special election;

(5) "Provisional ballot" means a ballot issued to a voter at the polling place on election day by the precinct election board, for one of the following reasons:

(a) The voter's name does not appear in the poll book;

(b) There is an indication in the poll book that the voter has requested an absentee ballot, but the voter wishes to vote at the polling place;

(c) There is a question on the part of the voter concerning the issues or candidates on which the voter is qualified to vote;

(6) "Party ballot" means a primary election ballot specific to a particular major political party that lists all partisan offices to be voted on at that primary, and the candidates for those offices who affiliate with that same major political party;

(7) "Nonpartisan ballot" means a primary election ballot that lists all nonpartisan races and ballot measures to be voted on at that primary.

NEW SECTION. Sec. 103. A new section is added to chapter 29A.04 RCW to read as follows:

"Major political party" means a political party of which at least one nominee for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year. A political party qualifying as a major political party under this section retains such status until the next even-year election at which a candidate of that party does not achieve at least five percent of the vote for one of the previously specified offices. If none of these offices appear on the ballot in an even-year general election, the major party retains its status as a major party through that election. However, a political party of which no nominee received at least ten percent of the total vote cast may forgo its status as a major political party by filing with the secretary of state an appropriate party rule within sixty days of attaining major party status under this section, or within fifteen days of the effective date of this section, whichever is later.

NEW SECTION. Sec. 104. A new section is added to chapter 29A.04 RCW to read as follows:

The county auditor of each county shall be ex officio the supervisor of all primaries and elections, general or special, and it shall be the county auditor's duty to provide places for holding such primaries and elections; to appoint the precinct election officers and to provide for their compensation; to provide the supplies and materials necessary for the conduct of elections to the precinct election officers; and to publish and post notices of calling such primaries and elections in the manner provided by law. The notice of a primary held in an even-numbered year must indicate that the office of precinct committee officer will be on the ballot. The auditor shall also apportion to each city, town, or district, and to the state of Washington in the odd-numbered year, its share of the expense of such primaries and elections. This section does not apply to general or special elections for any city, town, or district that is not subject to section 106 of this act and RCW 29A.04.330, but all such elections must be held and conducted at the time, in the manner, and by the officials (with such notice, requirements for filing for office, and certifications by local officers) as provided and required by the laws governing such elections.

NEW SECTION. Sec. 105. A new section is added to chapter 29A.04 RCW to read as follows:

Nominating primaries for general elections to be held in November, and the election of precinct committee officers, must be held on the third Tuesday of the preceding September or on the seventh Tuesday immediately preceding such general election, whichever occurs first.

NEW SECTION. Sec. 106. A new section is added to chapter 29A.04 RCW to read as follows:

(1) All state, county, city, town, and district general elections for the election of federal, state, legislative, judicial, county, city, town, and district officers, and for the submission to the voters of the state, county, city, town, or district of any measure for their adoption and approval or rejection, shall be held on the first Tuesday after the first Monday of November, in the year in which they may be called. A statewide general election shall be held on the first Tuesday after the first Monday of November of each year. However, the statewide general election held in odd-numbered years shall be limited to (a) city, town, and district general elections as provided for in RCW 29A.04.330, or as otherwise provided by law; (b) the election of federal officers for the remainder of any unexpired terms in the membership of either branch of the Congress of the United States; (c) the election of state and county officers for the remainder of any unexpired terms of offices created by or whose duties are described in Article II, section 15, Article III, sections 16, 17, 19, 20, 21, 22, and 23, and Article IV, sections 3 and 5 of the state Constitution and RCW 2.06.080; (d) the election of county officers in any county governed by a charter containing provisions calling for general county elections at this time; and (e) the approval or rejection of state measures, including proposed constitutional amendments, matters pertaining to any proposed constitutional convention, initiative measures and referendum measures proposed by the electorate, referendum bills, and any other matter provided by the legislature for submission to the electorate.

(2) A county legislative authority may, if it deems an emergency to exist, call a special county election by presenting a resolution to the county auditor at least forty-five days prior to the proposed election date. Except as provided in subsection (4) of this section, a special election called by the county legislative authority shall be held on one of the following dates as decided by such governing body:

(a) The first Tuesday after the first Monday in February;

(b) The second Tuesday in March;

(c) The fourth Tuesday in April;

(d) The third Tuesday in May;

(e) The day of the primary as specified by section 105 of this act; or

(f) The first Tuesday after the first Monday in November.

(3) In addition to the dates set forth in subsection (2)(a) through (f) of this section, a special election to validate an excess levy or bond issue may be called at any time to meet the needs resulting from fire, flood, earthquake, or other act of God. Such county special election shall be noticed and conducted in the manner provided by law.

(4) In a presidential election year, if a presidential preference primary is conducted in February, March, April, or May under chapter 29A.56 RCW, the date on which a special election may be called by the county legislative authority under subsection (2) of this section during the month

of that primary is the date of the presidential primary.

(5) This section shall supersede the provisions of any and all other statutes, whether general or special in nature, having different dates for such city, town, and district elections, the purpose of this section being to establish mandatory dates for holding elections except for those elections held pursuant to a home-rule charter adopted under Article XI, section 4 of the state Constitution. This section shall not be construed as fixing the time for holding primary elections, or elections for the recall of any elective public officer.

NEW SECTION. Sec. 107. A new section is added to chapter 29A.08 RCW to read as follows:

No record may be created or maintained by a state or local governmental agency or a political organization that identifies a voter with the information marked on the voter's ballot, including the choice that a voter makes on a partisan primary ballot regarding political party affiliation.

NEW SECTION. Sec. 108. A new section is added to chapter 29A.08 RCW to read as follows:

Under no circumstances may an individual be required to affiliate with, join, adhere to, express faith in, or declare a preference for, a political party or organization upon registering to vote.

NEW SECTION. Sec. 109. A new section is added to chapter 29A.12 RCW to read as follows:

The secretary of state shall not approve a vote tallying system unless it:

(1) Correctly counts votes on ballots on which the proper number of votes have been marked for any office or issue;

(2) Ignores votes marked for any office or issue where more than the allowable number of votes have been marked, but correctly counts the properly voted portions of the ballot;

(3) Accumulates a count of the specific number of ballots tallied for each precinct, total votes by candidate for each office, and total votes for and against each issue of the ballot in that precinct;

(4) Produces precinct and cumulative totals in printed form; and

(5) Except for functions or capabilities unique to this state, has been tested, certified, and used in at least one other state or election jurisdiction.

NEW SECTION. Sec. 110. A new section is added to chapter 29A.20 RCW to read as follows:

(1) Any nomination of a candidate for partisan public office by other than a major political party may be made only: (a) In a convention held not earlier than the last Saturday in June and not later than the first Saturday in July or during any of the seven days immediately preceding the first day for filing declarations of candidacy as fixed in accordance with section 118 of this act; (b) as provided by section 147 of this act; or (c) as otherwise provided in this section. Minor political party and independent candidates may appear only on the general election ballot.

(2) Nominations of candidates for president and vice president of the United States other than by

a major political party may be made either at a convention conducted under subsection (1) of this section, or at a similar convention taking place not earlier than the first Sunday in July and not later than seventy days before the general election. Conventions held during this time period may not nominate candidates for any public office other than president and vice president of the United States, except as provided in subsection (3) of this section.

(3) If a special filing period for a partisan office is opened under section 116 of this act, candidates of minor political parties and independent candidates may file for office during that special filing period. The names of those candidates may not appear on the general election ballot unless they are nominated by convention held no later than five days after the close of the special filing period and a certificate of nomination is filed with the filing officer no later than three days after the convention. The requirements of section 189 of this act do not apply to such a convention.

(4) A minor political party may hold more than one convention but in no case shall any such party nominate more than one candidate for any one partisan public office or position. For the purpose of nominating candidates for the offices of president and vice president, United States senator, United States representative, or a statewide office, a minor party or independent candidate holding multiple conventions may add together the number of signatures of different individuals from each convention obtained in support of the candidate or candidates in order to obtain the number required by section 111 of this act. For all other offices for which

nominations are made, signatures of the requisite number of registered voters must be obtained at a single convention.

NEW SECTION. Sec. 111. A new section is added to chapter 29A.20 RCW to read as follows:

(1) To be valid, a convention must be attended by at least one hundred registered voters.

(2) In order to nominate candidates for the offices of president and vice president of the United States, United States senator, United States representative, or any statewide office, a nominating convention shall obtain and submit to the filing officer the signatures of at least one thousand registered voters of the state of Washington. In order to nominate candidates for any other office, a nominating convention shall obtain and submit to the filing officer the signatures of one hundred persons who are registered to vote in the jurisdiction of the office for which the nominations are made.

NEW SECTION. Sec. 112. A new section is added to chapter 29A.20 RCW to read as follows:

A nominating petition submitted under this chapter shall clearly identify the name of the minor party or independent candidate convention as it appears on the certificate of nomination as required by section 154(3) of this act. The petition shall also contain a statement that the person signing the petition is a registered voter of the state of Washington and shall have a space for the voter to sign his or her name and to print his or her name and address. No person may sign more than one

nominating petition under this chapter for an office for an election.

NEW SECTION. Sec. 113. A new section is added to chapter 29A.20 RCW to read as follows:

Not later than the Friday immediately preceding the first day for candidates to file, the secretary of state shall notify the county auditors of the names and designations of all minor party and independent candidates who have filed valid convention certificates and nominating petitions with that office. Except for the offices of president and vice president, persons nominated under this chapter shall file declarations of candidacy as provided by section 158 of this act and RCW 29A.24.070. The name of a candidate nominated at a convention shall not be printed upon the general election ballot unless he or she pays the fee required by law to be paid by candidates for the same office to be nominated at a primary.

NEW SECTION. Sec. 114. A new section is added to chapter 29A.24 RCW to read as follows:

(1) The nominating petition authorized by section 160 of this act must be printed on sheets of uniform color and size, must include a place for each individual to sign and print his or her name and the address, city, and county at which he or she is registered to vote, and must contain no more than twenty numbered lines.

(2) For candidates for nonpartisan office and candidates of a major political party for partisan office, the nominating petition must be in substantially the following form:

The warning prescribed by RCW 29A.72.140; followed by:

We, the undersigned registered voters of (the state of Washington or the political subdivision for which the nomination is made) , hereby petition that the name of (candidate's name) be printed on the official primary ballot for the office of (insert name of office) .

(3) For independent candidates and candidates of a minor political party for partisan office, the nominating petition must be in substantially the following form:

The warning prescribed by RCW 29A.72.140; followed by:

We, the undersigned registered voters of (the state of Washington or the political subdivision for which the nomination is made), hereby petition that the name of (candidate's name) be printed on the official general election ballot for the office of (insert name of office).

NEW SECTION. Sec. 115. A new section is added to chapter 29A.24 RCW to read as follows:

A candidate may withdraw his or her declaration of candidacy at any time before the close of business on the Thursday following the last day for candidates to file under RCW 29A.24.050 by filing, with the officer with whom the declaration of candidacy was filed, a signed request that his or her name not be printed on the ballot. There shall be no withdrawal period for declarations of candidacy filed during special filing periods held under this title. The filing officer may permit the withdrawal of a

filing for the office of precinct committee officer at the request of the candidate at any time if no absentee ballots have been issued for that office and the ballots for that precinct have not been printed. The filing officer may permit the withdrawal of a filing for any elected office of a city, town, or special district at the request of the candidate at any time before a primary if the primary ballots for that city, town, or special district have not been ordered. No filing fee may be refunded to any candidate who withdraws under this section. Notice of the deadline for withdrawal of candidacy and that the filing fee is not refundable shall be given to each candidate at the time he or she files.

NEW SECTION. Sec. 116. A new section is added to chapter 29A.24 RCW to read as follows:

Filings for a partisan elective office shall be opened for a period of three normal business days whenever, on or after the first day of the regular filing period and before the sixth Tuesday prior to a primary, a vacancy occurs in that office, leaving an unexpired term to be filled by an election for which filings have not been held.

Any such special three-day filing period shall be fixed by the election officer with whom declarations of candidacy for that office are filed. The election officer shall give notice of the special three-day filing period by notifying the press, radio, and television in the county or counties involved, and by such other means as may be required by law.

Candidacies validly filed within the special three-day filing period shall appear on the ballot as if filed during the regular filing period.

NEW SECTION. Sec. 117. A new section is added to chapter 29A.24 RCW to read as follows:

Any person who desires to be a write-in candidate and have such votes counted at a primary or election may file a declaration of candidacy with the officer designated in RCW 29A.24.070 not later than the day before the primary or election. Declarations of candidacy for write-in candidates must be accompanied by a filing fee in the same manner as required of other candidates filing for the office as provided in section 160 of this act.

Votes cast for write-in candidates who have filed such declarations of candidacy and write-in votes for persons appointed by major political parties pursuant to section 192 of this act need only specify the name of the candidate in the appropriate location on the ballot in order to be counted. Write-in votes cast for any other candidate, in order to be counted, must designate the office sought and position number or political party, if the manner in which the write-in is done does not make the office or position clear.

No person may file as a write-in candidate where:

(1) At a general election, the person attempting to file either filed as a write-in candidate for the same office at the preceding primary or the person's name appeared on the ballot for the same office at the preceding primary;

(2) The person attempting to file as a write-in candidate has already filed a valid write-in declaration for that primary or election, unless one or

the other of the two filings is for the office of precinct committeeperson;

(3) The name of the person attempting to file already appears on the ballot as a candidate for another office, unless one of the two offices for which he or she is a candidate is precinct committeeperson.

The declaration of candidacy shall be similar to that required by section 158 of this act. No write-in candidate filing under this section may be included in any voter's pamphlet produced under chapter 29A.32 RCW unless that candidate qualifies to have his or her name printed on the general election ballot. The legislative authority of any jurisdiction producing a local voter's pamphlet under chapter 29A.32 RCW may provide, by ordinance, for the inclusion of write-in candidates in such pamphlets.

NEW SECTION. Sec. 118. A new section is added to chapter 29A.28 RCW to read as follows:

(1) Whenever a vacancy occurs in the United States house of representatives or the United States senate from this state, the governor shall order a special election to fill the vacancy. Minor political party candidates and independent candidates may be nominated through the convention procedures provided in chapter 29A.20 RCW.

(2) Within ten days of such vacancy occurring, he or she shall issue a writ of election fixing a date for the special vacancy election not less than ninety days after the issuance of the writ, fixing a date for the primary for nominating major political party candidates for the special vacancy election not less

than thirty days before the day fixed for holding the special vacancy election, fixing the dates for the special filing period, and designating the term or part of the term for which the vacancy exists. If the vacancy is in the office of United States representative, the writ of election shall specify the congressional district that is vacant.

(3) If the vacancy occurs less than six months before a state general election and before the second Friday following the close of the filing period for that general election, the special primary, special vacancy election, and minor party and independent candidate nominating conventions must be held in concert with the state primary and state general election in that year.

(4) If the vacancy occurs on or after the first day for filing under RCW 29A.24.050 and on or before the second Friday following the close of the filing period, a special filing period of three normal business days shall be fixed by the governor and notice thereof given to all media, including press, radio, and television within the area in which the vacancy election is to be held, to the end that, insofar as possible, all interested persons will be aware of such filing period. The last day of the filing period shall not be later than the third Tuesday before the primary at which major political party candidates are to be nominated. The names of major political party candidates who have filed valid declarations of candidacy during this three-day period shall appear on the approaching primary ballot. The requirements of section 189 of this act do not apply to a minor political party or independent candidate convention held under this subsection.

(5) If the vacancy occurs later than the second Friday following the close of the filing period, a special primary, special vacancy election, and the minor party and independent candidate conventions to fill the position shall be held after the next state general election but, in any event, no later than the ninetieth day following the November election.

NEW SECTION. Sec. 119. A new section is added to chapter 29A.28 RCW to read as follows:

The general election laws and laws relating to partisan primaries shall apply to the special primaries and vacancy elections provided for in chapter 29A.28 RCW to the extent that they are not inconsistent with the provisions of these sections. Minor political party and independent candidates may appear only on the general election ballot. Statutory time deadlines relating to availability of absentee ballots, certification, canvassing, and related procedures that cannot be met in a timely fashion may be modified for the purposes of a specific primary or vacancy election under this chapter by the secretary of state through emergency rules adopted under section 151 of this act.

NEW SECTION. Sec. 120. A new section is added to chapter 29A.28 RCW to read as follows:

If a vacancy occurs in the office of precinct committee officer by reason of death, resignation, or disqualification of the incumbent, or because of failure to elect, the respective county chair of the county central committee shall fill the vacancy by appointment. However, in a legislative district having a majority of its precincts in a county with a population of one million or more, the appointment

may be made only upon the recommendation of the legislative district chair. The person so appointed must have the same qualifications as candidates when filing for election to the office for that precinct. When a vacancy in the office of precinct committee officer exists because of failure to elect at a state primary, the vacancy may not be filled until after the organization meeting of the county central committee and the new county chair has been selected as provided by RCW 29A.80.030.

NEW SECTION. Sec. 121. A new section is added to chapter 29A.32 RCW to read as follows:

The voters' pamphlet must contain:

(1) Information about each ballot measure initiated by or referred to the voters for their approval or rejection as required by RCW 29A.32.070;

(2) In even-numbered years, statements, if submitted, advocating the candidacies of nominees for the office of president and vice president of the United States, United States senator, United States representative, governor, lieutenant governor, secretary of state, state treasurer, state auditor, attorney general, commissioner of public lands, superintendent of public instruction, insurance commissioner, state senator, state representative, justice of the supreme court, judge of the court of appeals, or judge of the superior court. Candidates may also submit a campaign mailing address and telephone number and a photograph not more than five years old and of a size and quality that the secretary of state determines to be suitable for reproduction in the voters' pamphlet;

(3) In odd-numbered years, if any office voted upon statewide appears on the ballot due to a vacancy, then statements and photographs for candidates for any vacant office listed in subsection (2) of this section must appear;

(4) In even-numbered years, a section explaining how voters may participate in the election campaign process; the address and telephone number of the public disclosure commission established under RCW 42.17.350; and a summary of the disclosure requirements that apply when contributions are made to candidates and political committees;

(5) In even-numbered years the name, address, and telephone number of each political party with nominees listed in the pamphlet, if filed with the secretary of state by the state committee of a major political party or the presiding officer of the convention of a minor political party;

(6) In each odd-numbered year immediately before a year in which a president of the United States is to be nominated and elected, information explaining the precinct caucus and convention process used by each major political party to elect delegates to its national presidential candidate nominating convention. The pamphlet must also provide a description of the statutory procedures by which minor political parties are formed and the statutory methods used by the parties to nominate candidates for president;

(7) An application form for an absentee ballot;

(8) A brief statement explaining the deletion and addition of language for proposed measures under RCW 29A.32.080;

(9) Any additional information pertaining to elections as may be required by law or in the judgment of the secretary of state is deemed informative to the voters.

NEW SECTION. Sec. 122. A new section is added to chapter 29A.32 RCW to read as follows:

If the secretary of state prints and distributes a voters' pamphlet for a primary in an even-numbered year, it must contain:

(1) A description of the office of precinct committee officer and its duties;

(2) An explanation that, for partisan offices, only voters who choose to affiliate with a major political party may vote in that party's primary election, and that voters must limit their participation in a partisan primary to one political party; and

(3) An explanation that minor political party candidates and independent candidates will appear only on the general election ballot.

NEW SECTION. Sec. 123. A new section is added to chapter 29A.32 RCW to read as follows:

The local voters' pamphlet shall include but not be limited to the following:

(1) Appearing on the cover, the words "official local voters' pamphlet," the name of the jurisdiction producing the pamphlet, and the date of the election or primary;

(2) A list of jurisdictions that have measures or candidates in the pamphlet;

(3) Information on how a person may register to vote and obtain an absentee ballot;

(4) The text of each measure accompanied by an explanatory statement prepared by the prosecuting attorney for any county measure or by the attorney for the jurisdiction submitting the measure if other than a county measure. All explanatory statements for city, town, or district measures not approved by the attorney for the jurisdiction submitting the measure shall be reviewed and approved by the county prosecuting attorney or city attorney, when applicable, before inclusion in the pamphlet;

(5) The arguments for and against each measure submitted by committees selected pursuant to RCW 29A.32.280; and

(6) For partisan primary elections, information on how to vote the applicable ballot format and an explanation that minor political party candidates and independent candidates will appear only on the general election ballot.

NEW SECTION. Sec. 124. A new section is added to chapter 29A.36 RCW to read as follows:

On or before the day following the last day for major political parties to fill vacancies in the ticket as provided by section 191 of this act, the secretary of state shall certify to each county auditor a list of the candidates who have filed declarations of candidacy in his or her office for the primary. For each office, the certificate shall include the name of each

candidate, his or her address, and his or her party designation, if any. Minor political party and independent candidates may appear only on the general election ballot.

NEW SECTION. Sec. 125. A new section is added to chapter 29A.36 RCW to read as follows:

Except for the candidates for the positions of president and vice president, for a partisan or nonpartisan office for which no primary is required, or for independent or minor party candidates, the names of all candidates who, under this title, filed a declaration of candidacy or were certified as a candidate to fill a vacancy on a major party ticket will appear on the appropriate ballot at the primary throughout the jurisdiction in which they are to be nominated.

NEW SECTION. Sec. 126. A new section is added to chapter 29A.36 RCW to read as follows:

Partisan primaries must be conducted using either:

(1) A consolidated ballot format that includes a major political party identification check-off box that allows a voter to select from a list of the major political parties the major political party with which the voter chooses to affiliate. The consolidated ballot must include all partisan races, nonpartisan races, and ballot measures to be voted on at that primary; or

(2) A physically separate ballot format that includes both party ballots and a nonpartisan ballot. A party ballot must be specific to a particular major political party and may include only the partisan

offices to be voted on at that primary and the names of candidates for those partisan offices who designated that same major political party in their declarations of candidacy. The nonpartisan ballot must include all nonpartisan races and ballot measures to be voted on at that primary.

NEW SECTION. Sec. 127. A new section is added to chapter 29A.36 RCW to read as follows:

(1) If the consolidated ballot format is used, the major political party identification check-off box must appear on the primary ballot before all offices and ballot measures. Clear and concise instructions to the voter must be prominently displayed immediately before the list of major political parties, and must include:

(a) A question asking the voter to indicate the major political party with which the voter chooses to affiliate;

(b) A statement that, for a major political party candidate, only votes cast by voters who choose to affiliate with that same major political party will be tabulated and reported;

(c) A statement that votes cast for a major political party candidate by a voter who chooses to affiliate with a different major political party will not be tabulated or reported;

(d) A statement that votes cast for a major political party candidate by a voter who fails to select a major political party affiliation will not be tabulated or reported;

(e) A statement that votes cast for a major political party candidate by a voter who selects more

than one major political party with which to affiliate will not be tabulated or reported; and

(f) A statement that the party identification option will not affect votes cast for candidates for nonpartisan offices, or for or against ballot measures.

(2) If the physically separate ballot format is used, clear and concise instructions to the voter must be prominently displayed, and must include:

(a) A statement explaining that only one party ballot and one nonpartisan ballot may be voted;

(b) A statement explaining that if more than one party ballot is voted, none of the party ballots will be tabulated or reported;

(c) A statement explaining that a voter's affiliation with a major political party will be inferred from the act of voting the party ballot for that major political party; and

(d) A statement explaining that every eligible registered voter may vote a nonpartisan ballot, regardless of any party affiliation on the part of the voter.

NEW SECTION. Sec. 128. A new section is added to chapter 29A.36 RCW to read as follows:

Every ballot for a single combination of issues, offices, and candidates shall be uniform within a precinct and shall identify the type of primary or election, the county, and the date of the primary or election, and the ballot or voting device shall contain instructions on the proper method of recording a vote, including write-in votes. Each position, together with the names of the candidates for that office, shall

be clearly separated from other offices or positions in the same jurisdiction. The offices in each jurisdiction shall be clearly separated from each other. No paper ballot or ballot card may be marked in any way that would permit the identification of the person who voted that ballot.

NEW SECTION. Sec. 129. A new section is added to chapter 29A.36 RCW to read as follows:

(1)(a) The positions or offices on a primary consolidated ballot shall be arranged in substantially the following order: United States senator; United States representative; governor; lieutenant governor; secretary of state; state treasurer; state auditor; attorney general; commissioner of public lands; superintendent of public instruction; insurance commissioner; state senator; state representative; county officers; justices of the supreme court; judges of the court of appeals; judges of the superior court; and judges of the district court. For all other jurisdictions on the primary consolidated ballot, the offices in each jurisdiction shall be grouped together and be in the order of the position numbers assigned to those offices, if any.

(b)(i) The positions or offices on a primary party ballot must be arranged in substantially the following order: United States senator; United States representative; governor; lieutenant governor; secretary of state; state treasurer; state auditor; attorney general; commissioner of public lands; insurance commissioner; state senator; state representative; and partisan county officers. For all other jurisdictions on the primary party ballot, the offices in each jurisdiction must be grouped together

and be in the order of the position numbers assigned to those offices, if any.

(ii) The positions or offices on a primary nonpartisan ballot must be arranged in substantially the following order: Superintendent of public instruction; justices of the supreme court; judges of the court of appeals; judges of the superior court; and judges of the district court. For all other jurisdictions on the primary nonpartisan ballot, the offices in each jurisdiction must be grouped together and be in the order of the position numbers assigned to those offices, if any.

(2) The order of the positions or offices on an election ballot shall be substantially the same as on a primary consolidated ballot except that state ballot issues must be placed before all offices. The offices of president and vice president of the United States shall precede all other offices on a presidential election ballot. The positions on a ballot to be assigned to ballot measures regarding local units of government shall be established by the secretary of state by rule.

(3) The political party or independent candidacy of each candidate for partisan office shall be indicated next to the name of the candidate on the primary and election ballot. A candidate shall file a written notice with the filing officer within three business days after the close of the filing period designating the political party to be indicated next to the candidate's name on the ballot if either: (a) The candidate has been nominated by two or more minor political parties or independent conventions; or (b) the candidate has both filed a declaration of

candidacy declaring an affiliation with a major political party and been nominated by a minor political party or independent convention. If no written notice is filed the filing officer shall give effect to the party designation shown upon the first document filed. A candidate may be deemed nominated by a minor party or independent convention only if all documentation required by chapter 29A.20 RCW has been timely filed.

NEW SECTION. Sec. 130. A new section is added to chapter 29A.36 RCW to read as follows:

After the close of business on the last day for candidates to file for office, the filing officer shall, from among those filings made in person and by mail, determine by lot the order in which the names of those candidates will appear on all primary, sample, and absentee ballots. The determination shall be done publicly and may be witnessed by the media and by any candidate. If no primary is required for any nonpartisan office under section 172 of this act or RCW 29A.52.220, or if any independent or minor party candidate files a declaration of candidacy, the names shall appear on the general election ballot in the order determined by lot.

NEW SECTION. Sec. 131. A new section is added to chapter 29A.36 RCW to read as follows:

Except in each county with a population of one million or more, on or before the fifteenth day before a primary or election, the county auditor shall prepare a sample ballot which shall be made readily available to members of the public. The secretary of state shall adopt rules governing the preparation of sample ballots in counties with a population of one

million or more. The rules shall permit, among other alternatives, the preparation of more than one sample ballot by a county with a population of one million or more for a primary or election, each of which lists a portion of the offices and issues to be voted on in that county. The position of precinct committee officer shall be shown on the sample ballot for the primary, but the names of candidates for the individual positions need not be shown.

NEW SECTION. Sec. 132. A new section is added to chapter 29A.36 RCW to read as follows:

(1) On the top of each ballot must be printed clear and concise instructions directing the voter how to mark the ballot, including write-in votes. On the top of each primary ballot must be printed the instructions required by this chapter.

(2) The questions of adopting constitutional amendments or any other state measure authorized by law to be submitted to the voters at that election must appear after the instructions and before any offices.

(3) In a year that president and vice president appear on the general election ballot, the names of candidates for president and vice president for each political party must be grouped together with a single response position for a voter to indicate his or her choice.

(4) On a general election ballot, the candidate or candidates of the major political party that received the highest number of votes from the electors of this state for the office of president of the United States at the last presidential election must

appear first following the appropriate office heading. The candidate or candidates of the other major political parties will follow according to the votes cast for their nominees for president at the last presidential election, and independent candidates and the candidate or candidates of all other parties will follow in the order of their qualification with the secretary of state.

(5) All paper ballots and ballot cards used at a polling place must be sequentially numbered in such a way to permit removal of such numbers without leaving any identifying marks on the ballot.

NEW SECTION. Sec. 133. A new section is added to chapter 29A.36 RCW to read as follows:

The name of a candidate for a partisan office for which a primary was conducted shall not be printed on the ballot for that office at the subsequent general election unless, at the preceding primary, the candidate receives a number of votes equal to at least one percent of the total number of votes cast for all candidates for that office and a plurality of the votes cast by voters affiliated with that party for candidates for that office affiliated with that party.

NEW SECTION. Sec. 134. A new section is added to chapter 29A.40 RCW to read as follows:

(1) The county auditor shall issue an absentee ballot for the primary or election for which it was requested, or for the next occurring primary or election when ongoing absentee status has been requested if the information contained in a request for an absentee ballot or ongoing absentee status received by the county auditor is complete and

correct and the applicant is qualified to vote under federal or state law. Otherwise, the county auditor shall notify the applicant of the reason or reasons why the request cannot be accepted. Whenever two or more candidates have filed for the position of precinct committee officer for the same party in the same precinct, the contest for that position must be presented to absentee voters from that precinct by either including the contest on the regular absentee ballot or a separate absentee ballot. The ballot must provide space designated for writing in the name of additional candidates.

(2) A registered voter may obtain a replacement ballot if the ballot is destroyed, spoiled, lost, or not received by the voter. The voter may obtain the ballot by telephone request, by mail, electronically, or in person. The county auditor shall keep a record of each replacement ballot provided under this subsection.

(3) A copy of the state voters' pamphlet must be sent to registered voters temporarily outside the state, out-of-state voters, overseas voters, and service voters along with the absentee ballot if such a pamphlet has been prepared for the primary or election and is available to the county auditor at the time of mailing. The county auditor shall mail all absentee ballots and related material to voters outside the territorial limits of the United States and the District of Columbia under 39 U.S.C. 3406.

NEW SECTION. Sec. 135. A new section is added to chapter 29A.40 RCW to read as follows:

The county auditor shall send each absentee voter a ballot, a security envelope in which to seal

the ballot after voting, a larger envelope in which to return the security envelope, and instructions on how to mark the ballot and how to return it to the county auditor. The instructions that accompany an absentee ballot for a partisan primary must include instructions for voting the applicable ballot style, as provided in chapter 29A.36 RCW. The larger return envelope must contain a declaration by the absentee voter reciting his or her qualifications and stating that he or she has not voted in any other jurisdiction at this election, together with a summary of the penalties for any violation of any of the provisions of this chapter. The return envelope must provide space for the voter to indicate the date on which the ballot was voted and for the voter to sign the oath. A summary of the applicable penalty provisions of this chapter must be printed on the return envelope immediately adjacent to the space for the voter's signature. The signature of the voter on the return envelope must affirm and attest to the statements regarding the qualifications of that voter and to the validity of the ballot. For out-of-state voters, overseas voters, and service voters, the signed declaration on the return envelope constitutes the equivalent of a voter registration for the election or primary for which the ballot has been issued. The voter must be instructed to either return the ballot to the county auditor by whom it was issued or attach sufficient first class postage, if applicable, and mail the ballot to the appropriate county auditor no later than the day of the election or primary for which the ballot was issued.

If the county auditor chooses to forward absentee ballots, he or she must include with the

ballot a clear explanation of the qualifications necessary to vote in that election and must also advise a voter with questions about his or her eligibility to contact the county auditor. This explanation may be provided on the ballot envelope, on an enclosed insert, or printed directly on the ballot itself. If the information is not included, the envelope must clearly indicate that the ballot is not to be forwarded and that return postage is guaranteed.

NEW SECTION. Sec. 136. A new section is added to chapter 29A.44 RCW to read as follows:

A voter desiring to vote shall give his or her name to the precinct election officer who has the precinct list of registered voters. This officer shall announce the name to the precinct election officer who has the copy of the inspector's poll book for that precinct. If the right of this voter to participate in the primary or election is not challenged, the voter must be issued a ballot or permitted to enter a voting booth or to operate a voting device. For a partisan primary in a jurisdiction using the physically separate ballot format, the voter must be issued a nonpartisan ballot and each party ballot. The number of the ballot or the voter must be recorded by the precinct election officers. If the right of the voter to participate is challenged, RCW 29A.08.810 and 29A.08.820 apply to that voter.

NEW SECTION. Sec. 137. A new section is added to chapter 29A.44 RCW to read as follows:

On signing the precinct list of registered voters or being issued a ballot, the voter shall, without leaving the polling place or disability access

location, proceed to one of the voting booths or voting devices to cast his or her vote. When county election procedures so provide, the election officers may tear off and retain the numbered stub from the ballot before delivering it to the voter. If an election officer has not already done so, when the voter has finished, he or she shall either (1) remove the numbered stub from the ballot, place the ballot in the ballot box, and return the number to the election officers, or (2) deliver the entire ballot to the election officers, who shall remove the numbered stub from the ballot and place the ballot in the ballot box. For a partisan primary in a jurisdiction using the physically separate ballot format, the voter shall also return unvoted party ballots to the precinct election officers, who shall void the unvoted party ballots and return them to the county auditor. If poll-site ballot counting devices are used, the voter shall put the ballot in the device.

NEW SECTION. Sec. 138. A new section is added to chapter 29A.44 RCW to read as follows:

As each voter casts his or her vote, the precinct election officers shall insert in the poll books or precinct list of registered voters opposite that voter's name, a notation to credit the voter with having participated in that primary or election. No record may be made of a voter's party affiliation in a partisan primary. The precinct election officers shall record the voter's name so that a separate record is kept.

NEW SECTION. Sec. 139. A new section is added to chapter 29A.52 RCW to read as follows:

Major political party candidates for all partisan elected offices, except for president and vice president, precinct committee officer, and offices exempted from the primary under section 172 of this act, must be nominated at primaries held under this chapter.

NEW SECTION. Sec. 140. A new section is added to chapter 29A.52 RCW to read as follows:

It is the intent of the legislature to create a primary for all partisan elected offices, except for president and vice president, precinct committee officer, and offices exempted from the primary under section 172 of this act, that:

(1) Allows each voter to participate;

(2) Preserves the privacy of each voter's party affiliation;

(3) Rejects mandatory voter registration by political party;

(4) Protects ballot access for all candidates, including minor political party and independent candidates;

(5) Maintains a candidate's right to self-identify with any major political party; and

(6) Upholds a political party's First Amendment right of association.

NEW SECTION. Sec. 141. A new section is added to chapter 29A.52 RCW to read as follows:

Instructions for voting a consolidated ballot or a physically separate ballot, whichever is applicable, must appear, at the very least, in:

(1) Any primary voters' pamphlet prepared by the secretary of state or a local government if a partisan office will appear on the ballot;

(2) Instructions that accompany any partisan primary ballot;

(3) Any notice of a partisan primary published in compliance with section 145 of this act;

(4) A sample ballot prepared by a county auditor under section 131 of this act for a partisan primary;

(5) The web site of the office of the secretary of state and any existing web site of a county auditor's office; and

(6) Every polling place.

NEW SECTION. Sec. 142. A new section is added to chapter 29A.52 RCW to read as follows:

(1) Under a consolidated ballot format:

(a) Votes for a major political party candidate will only be tabulated and reported if cast by voters who choose to affiliate with that same major political party;

(b) Votes cast for a major political party candidate by a voter who chooses to affiliate with a different major political party may not be tabulated or reported;

(c) Votes cast for a major political party candidate by a voter who fails to select a major political party affiliation may not be tabulated or reported;

(d) Votes cast for a major political party candidate by a voter who selects more than one major political party with which to affiliate may not be tabulated or reported; and

(e) Votes properly cast may not be affected by votes improperly cast for other races.

(2) Under a physically separate ballot format:

(a) Only one party ballot and one nonpartisan ballot may be voted;

(b) If more than one party ballot is voted, none of the ballots will be tabulated or reported;

(c) A voter's affiliation with a major political party will be inferred from the act of voting the party ballot for that major political party; and

(d) Every eligible registered voter may vote a nonpartisan ballot.

NEW SECTION. Sec. 143. A new section is added to chapter 29A.52 RCW to read as follows:

So far as applicable, the provisions of this title relating to conducting general elections govern the conduct of primaries.

NEW SECTION. Sec. 144. A new section is added to chapter 29A.52 RCW to read as follows:

Nothing in this chapter may be construed to mean that a voter may cast more than one vote for candidates for a given office.

NEW SECTION. Sec. 145. A new section is added to chapter 29A.52 RCW to read as follows:

Not more than ten nor less than three days before the primary the county auditor shall publish notice of such primary in one or more newspapers of general circulation within the county. The notice must contain the proper party designations, the names and addresses of all persons who have filed a declaration of candidacy to be voted upon at that primary, instructions for voting the applicable ballot, as provided in chapter 29A.36 RCW, the hours during which the polls will be open, and the polling places for each precinct, giving the address of each polling place. The names of all candidates for nonpartisan offices must be published separately with designation of the offices for which they are candidates but without party designation. This is the only notice required for the holding of any primary.

NEW SECTION. Sec. 146. A new section is added to chapter 29A.52 RCW to read as follows:

No later than the day following the certification of the returns of any primary, the secretary of state shall certify to the appropriate county auditors the names of all persons nominated for offices at a primary, or at an independent candidate or minor party convention.

NEW SECTION. Sec. 147. A new section is added to chapter 29A.60 RCW to read as follows:

(1) For any office at any election or primary, any voter may write in on the ballot the name of any person for an office who has filed as a write-in candidate for the office in the manner provided by section 117 of this act and such vote shall be counted the same as if the name had been printed on the ballot and marked by the voter. For a partisan

primary in a jurisdiction using the physically separate ballot format, a voter may write in on a party ballot only the names of write-in candidates who affiliate with that major political party. No write-in vote made for any person who has not filed a declaration of candidacy pursuant to section 117 of this act is valid if that person filed for the same office, either as a regular candidate or a write-in candidate, at the preceding primary. Any abbreviation used to designate office, position, or political party shall be accepted if the canvassing board can determine, to their satisfaction, the voter's intent.

(2) The number of write-in votes cast for each office must be recorded and reported with the canvass for the election.

(3) Write-in votes cast for an individual candidate for an office need not be tallied if the total number of write-in votes and under votes recorded by the vote tabulation system for the office is not greater than the number of votes cast for the candidate apparently nominated or elected, and the write-in votes could not have altered the outcome of the primary or election. In the case of write-in votes for statewide office or for any office whose jurisdiction encompasses more than one county, write-in votes for an individual candidate must be tallied whenever the county auditor is notified by either the office of the secretary of state or another auditor in a multicounty jurisdiction that it appears that the write-in votes could alter the outcome of the primary or election.

(4) In the case of statewide offices or jurisdictions that encompass more than one county, if the total number of write-in votes and under votes recorded by the vote tabulation system for an office within a county is greater than the number of votes cast for a candidate apparently nominated or elected in a primary or election, the auditor shall tally all write-in votes for individual candidates for that office and notify the office of the secretary of state and the auditors of the other counties within the jurisdiction, that the write-in votes for individual candidates should be tallied.

NEW SECTION. Sec. 148. A new section is added to chapter 29A.80 RCW to read as follows:

Any member of a major political party who is a registered voter in the precinct may upon payment of a fee of one dollar file his or her declaration of candidacy as prescribed under section 158 of this act with the county auditor for the office of precinct committee officer of his or her party in that precinct. When elected at the primary, the precinct committee officer shall serve so long as the committee officer remains an eligible voter in that precinct.

NEW SECTION. Sec. 149. A new section is added to chapter 29A.80 RCW to read as follows:

The statutory requirements for filing as a candidate at the primaries apply to candidates for precinct committee officer. The office must be voted upon at the primaries, and the names of all candidates must appear under the proper party and office designations on the ballot for the primary for each even-numbered year, and the one receiving the highest number of votes will be declared elected.

However, to be declared elected, a candidate must receive at least ten percent of the number of votes cast for the candidate of the candidate's party receiving the greatest number of votes in the precinct. The term of office of precinct committee officer is two years, commencing the first day of December following the primary.

NEW SECTION. Sec. 150. A new section is added to chapter 29A.80 RCW to read as follows:

Within forty-five days after the statewide general election in even-numbered years, the county chair of each major political party shall call separate meetings of all elected precinct committee officers in each legislative district for the purpose of electing a legislative district chair in such district. The district chair shall hold office until the next legislative district reorganizational meeting two years later, or until a successor is elected.

The legislative district chair may be removed only by the majority vote of the elected precinct committee officers in the chair's district.

NEW SECTION. Sec. 151. A new section is added to chapter 29A.04 RCW to read as follows:

The secretary of state as chief election officer shall make reasonable rules in accordance with chapter 34.05 RCW not inconsistent with the federal and state election laws to effectuate any provision of this title and to facilitate the execution of its provisions in an orderly, timely, and uniform manner relating to any federal, state, county, city, town, and district elections. To that end the secretary shall

assist local election officers by devising uniform forms and procedures.

In addition to the rule-making authority granted otherwise by this section, the secretary of state shall make rules governing the following provisions:

(1) The maintenance of voter registration records;

(2) The preparation, maintenance, distribution, review, and filing of precinct maps;

(3) Standards for the design, layout, and production of ballots;

(4) The examination and testing of voting systems for certification;

(5) The source and scope of independent evaluations of voting systems that may be relied upon in certifying voting systems for use in this state;

(6) Standards and procedures for the acceptance testing of voting systems by counties;

(7) Standards and procedures for testing the programming of vote tallying software for specific primaries and elections;

(8) Standards and procedures for the preparation and use of each type of certified voting system including procedures for the operation of counting centers where vote tallying systems are used;

(9) Standards and procedures to ensure the accurate tabulation and canvassing of ballots;

(10) Consistency among the counties of the state in the preparation of ballots, the operation of vote tallying systems, and the canvassing of primaries and elections;

(11) Procedures to ensure the secrecy of a voter's ballot when a small number of ballots are counted at the polls or at a counting center;

(12) The use of substitute devices or means of voting when a voting device at the polling place is found to be defective, the counting of votes cast on the defective device, the counting of votes cast on the substitute device, and the documentation that must be submitted to the county auditor regarding such circumstances;

(13) Procedures for the transportation of sealed containers of voted ballots or sealed voting devices;

(14) The acceptance and filing of documents via electronic facsimile;

(15) Voter registration applications and records;

(16) The use of voter registration information in the conduct of elections;

(17) The coordination, delivery, and processing of voter registration records accepted by driver licensing agents or the department of licensing;

(18) The coordination, delivery, and processing of voter registration records accepted by agencies designated by the governor to provide voter registration services;

(19) Procedures to receive and distribute voter registration applications by mail;

(20) Procedures for a voter to change his or her voter registration address within a county by telephone;

(21) Procedures for a voter to change the name under which he or she is registered to vote;

(22) Procedures for canceling dual voter registration records and for maintaining records of persons whose voter registrations have been canceled;

(23) Procedures for the electronic transfer of voter registration records between county auditors and the office of the secretary of state;

(24) Procedures and forms for declarations of candidacy;

(25) Procedures and requirements for the acceptance and filing of declarations of candidacy by electronic means;

(26) Procedures for the circumstance in which two or more candidates have a name similar in sound or spelling so as to cause confusion for the voter;

(27) Filing for office;

(28) The order of positions and offices on a ballot;

(29) Sample ballots;

(30) Independent evaluations of voting systems;

(31) The testing, approval, and certification of voting systems;

(32) The testing of vote tallying software programming;

(33) Standards and procedures to prevent fraud and to facilitate the accurate processing and canvassing of absentee ballots and mail ballots;

(34) Standards and procedures to guarantee the secrecy of absentee ballots and mail ballots;

(35) Uniformity among the counties of the state in the conduct of absentee voting and mail ballot elections;

(36) Standards and procedures to accommodate out-of-state voters, overseas voters, and service voters;

(37) The tabulation of paper ballots before the close of the polls;

(38) The accessibility of polling places and registration facilities that are accessible to elderly and disabled persons;

(39) The aggregation of precinct results if reporting the results of a single precinct could jeopardize the secrecy of a person's ballot;

(40) Procedures for conducting a statutory recount;

(41) Procedures for filling vacancies in congressional offices if the general statutory time requirements for availability of absentee ballots, certification, canvassing, and related procedures cannot be met;

(42) Procedures for the statistical sampling of signatures for purposes of verifying and canvassing signatures on initiative, referendum, and recall election petitions;

(43) Standards and deadlines for submitting material to the office of the secretary of state for the voters' pamphlet;

(44) Deadlines for the filing of ballot titles for referendum bills and constitutional amendments if none have been provided by the legislature;

(45) Procedures for the publication of a state voters' pamphlet;

(46) Procedures for conducting special elections regarding nuclear waste sites if the general statutory time requirements for availability of absentee ballots, certification, canvassing, and related procedures cannot be met;

(47) Procedures for conducting partisan primary elections;

(48) Standards and procedures for the proper conduct of voting during the early voting period to provide accessability for the blind or visually impaired;

(49) Standards for voting technology and systems used by the state or any political subdivision to be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation, including privacy and independence, as other voters;

(50) All data formats for transferring voter registration data on electronic or machine-readable media for the purpose of administering the statewide voter registration list required by the Help America Vote Act (P.L. 107-252);

(51) Defining the interaction of electronic voter registration election management systems employed by each county auditor to maintain a local copy of each county's portion of the official state list of registered voters;

(52) Provisions and procedures to implement the state-based administrative complaint procedure as required by the Help America Vote Act (P.L. 107-252); and

(53) Facilitating the payment of local government grants to local government election officers or vendors.

NEW SECTION. Sec. 152. A new section is added to chapter 29A.04 RCW to read as follows:

"Primary" or "primary election" means a statutory procedure for nominating candidates to public office at the polls.

NEW SECTION. Sec. 153. A new section is added to chapter 29A.20 RCW to read as follows:

(1) A person filing a declaration of candidacy for an office shall, at the time of filing, be a registered voter and possess the qualifications specified by law for persons who may be elected to the office.

(2) Excluding the office of precinct committee officer or a temporary elected position such as a

charter review board member or freeholder, no person may file for more than one office.

(3) The name of a candidate for an office shall not appear on a ballot for that office unless, except as provided in RCW 3.46.067 and 3.50.057, the candidate is, at the time the candidate's declaration of candidacy is filed, properly registered to vote in the geographic area represented by the office. For the purposes of this section, each geographic area in which registered voters may cast ballots for an office is represented by that office. If a person elected to an office must be nominated from a district or similar division of the geographic area represented by the office, the name of a candidate for the office shall not appear on a primary ballot for that office unless the candidate is, at the time the candidate's declaration of candidacy is filed, properly registered to vote in that district or division. The officer with whom declarations of candidacy must be filed under this title shall review each such declaration filed regarding compliance with this subsection.

(4) The requirements of voter registration and residence within the geographic area of a district do not apply to candidates for congressional office. Qualifications for the United States congress are specified in the United States Constitution.

NEW SECTION. Sec. 154. A new section is added to chapter 29A.20 RCW to read as follows:

A certificate evidencing nominations made at a convention must:

(1) Be in writing;

(2) Contain the name of each person nominated, his or her residence, and the office for which he or she is named, and if the nomination is for the offices of president and vice president of the United States, a sworn statement from both nominees giving their consent to the nomination;

(3) Identify the minor political party or the independent candidate on whose behalf the convention was held;

(4) Be verified by the oath of the presiding officer and secretary;

(5) Be accompanied by a nominating petition or petitions bearing the signatures and addresses of registered voters equal in number to that required by section 111 of this act;

(6) Contain proof of publication of the notice of calling the convention; and

(7) Be submitted to the appropriate filing officer not later than one week following the adjournment of the convention at which the nominations were made. If the nominations are made only for offices whose jurisdiction is entirely within one county, the certificate and nominating petitions must be filed with the county auditor. If a minor party or independent candidate convention nominates any candidates for offices whose jurisdiction encompasses more than one county, all nominating petitions and the convention certificates must be filed with the secretary of state.

NEW SECTION. Sec. 155. A new section is added to chapter 29A.20 RCW to read as follows:

(1) If two or more valid certificates of nomination are filed purporting to nominate different candidates for the same position using the same party name, the filing officer must give effect to both certificates. If conflicting claims to the party name are not resolved either by mutual agreement or by a judicial determination of the right to the name, the candidates must be treated as independent candidates. Disputes over the right to the name must not be permitted to delay the printing of either ballots or a voters' pamphlet. Other candidates nominated by the same conventions may continue to use the partisan affiliation unless a court of competent jurisdiction directs otherwise.

(2) A person affected may petition the superior court of the county in which the filing officer is located for a judicial determination of the right to the name of a minor political party, either before or after documents are filed with the filing officer. The court shall resolve the conflict between competing claims to the use of the same party name according to the following principles: (a) The prior established public use of the name during previous elections by a party composed of or led by the same individuals or individuals in documented succession; (b) prior established public use of the name earlier in the same election cycle; (c) the nomination of a more complete slate of candidates for a number of offices or in a number of different regions of the state; (d) documented affiliation with a national or statewide party organization with an established use of the name; (e) the first date of filing of a certificate of nomination; and (f) such other indicia of an established right to use of the name as the court may

deem relevant. If more than one filing officer is involved, and one of them is the secretary of state, the petition must be filed in the superior court for Thurston county. Upon resolving the conflict between competing claims, the court may also address any ballot designation for the candidate who does not prevail.

NEW SECTION. Sec. 156. A new section is added to chapter 29A.20 RCW to read as follows:

A minor political party or independent candidate convention nominating candidates for the offices of president and vice president of the United States shall, not later than ten days after the adjournment of the convention, submit a list of presidential electors to the office of the secretary of state. The list shall contain the names and the mailing addresses of the persons selected and shall be verified by the presiding officer of the convention.

NEW SECTION. Sec. 157. A new section is added to chapter 29A.20 RCW to read as follows:

Upon the receipt of the certificate of nomination, the officer with whom it is filed shall check the certificate and canvass the signatures on the accompanying nominating petitions to determine if the requirements of section 111 of this act have been met. Once the determination has been made, the filing officer shall notify the presiding officer of the convention and any other persons requesting the notification, of his or her decision regarding the sufficiency of the certificate or the nominating petitions. Any appeal regarding the filing officer's determination must be filed with the superior court of the county in which the certificate or petitions

were filed not later than five days from the date the determination is made, and shall be heard and finally disposed of by the court within five days of the filing. Nominating petitions shall not be available for public inspection or copying.

NEW SECTION. Sec. 158. A new section is added to chapter 29A.24 RCW to read as follows:

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) A place for the candidate to indicate a party designation, if applicable;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under section 160 of this act;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in section 160 of this act.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process.

NEW SECTION. Sec. 159. A new section is added to chapter 29A.24 RCW to read as follows:

Any candidate may mail his or her declaration of candidacy for an office to the filing officer. Such declarations of candidacy shall be processed by the filing officer in the following manner:

(1) Any declaration received by the filing officer by mail before the tenth business day immediately preceding the first day for candidates to file for office shall be returned to the candidate submitting it, together with a notification that the declaration of candidacy was received too early to be processed. The candidate shall then be permitted to resubmit his or her declaration of candidacy during the filing period.

(2) Any properly executed declaration of candidacy received by mail on or after the tenth business day immediately preceding the first day for candidates to file for office and before the close of business on the last day of the filing period shall be included with filings made in person during the filing period. In partisan and judicial elections the filing officer shall determine by lot the order in which the names of those candidates shall appear upon sample and absentee primary ballots.

(3) Any declaration of candidacy received by the filing officer after the close of business on the last day for candidates to file for office shall be rejected and returned to the candidate attempting to file it.

NEW SECTION. Sec. 160. A new section is added to chapter 29A.24 RCW to read as follows:

A filing fee of one dollar shall accompany each declaration of candidacy for precinct committee officer; a filing fee of ten dollars shall accompany the declaration of candidacy for any office with a fixed annual salary of one thousand dollars or less; a filing fee equal to one percent of the annual salary of the office at the time of filing shall accompany the declaration of candidacy for any office with a fixed annual salary of more than one thousand dollars per annum. No filing fee need accompany a declaration of candidacy for any office for which compensation is on a per diem or per meeting attended basis.

A candidate who lacks sufficient assets or income at the time of filing to pay the filing fee required by this section shall submit with his or her declaration of candidacy a nominating petition. The petition shall contain not less than a number of

signatures of registered voters equal to the number of dollars of the filing fee. The signatures shall be of voters registered to vote within the jurisdiction of the office for which the candidate is filing.

When the candidacy is for:

(1) A legislative or judicial office that includes territory from more than one county, the fee shall be paid to the secretary of state for equal division between the treasuries of the counties comprising the district.

(2) A city or town office, the fee shall be paid to the county auditor who shall transmit it to the city or town clerk for deposit in the city or town treasury.

NEW SECTION. Sec. 161. A new section is added to chapter 29A.24 RCW to read as follows:

Nominating petitions may be rejected for the following reasons:

(1) The petition is not in the proper form;

(2) The petition clearly bears insufficient signatures;

(3) The petition is not accompanied by a declaration of candidacy;

(4) The time within which the petition and the declaration of candidacy could have been filed has expired.

If the petition is accepted, the officer with whom it is filed shall canvass the signatures contained on it and shall reject the signatures of those persons who are not registered voters and the signatures of those persons who are not registered to

vote within the jurisdiction of the office for which the nominating petition is filed. He or she shall additionally reject any signature that appears on the nominating petitions of two or more candidates for the same office and shall also reject, each time it appears, the name of any person who signs the same petition more than once.

If the officer with whom the petition is filed refuses to accept the petition or refuses to certify the petition as bearing sufficient valid signatures, the person filing the petition may appeal that action to the superior court. The application for judicial review shall take precedence over other cases and matters and shall be speedily heard and determined.

NEW SECTION. Sec. 162. A new section is added to chapter 29A.24 RCW to read as follows:

A void in candidacy for a nonpartisan office occurs when an election for such office, except for the short term, has been scheduled and no valid declaration of candidacy has been filed for the position or all persons filing such valid declarations of candidacy have died or been disqualified.

NEW SECTION. Sec. 163. A new section is added to chapter 29A.24 RCW to read as follows:

The election officer with whom declarations of candidacy are filed shall give notice of a void in candidacy for a nonpartisan office, by notifying press, radio, and television in the county and by such other means as may now or hereafter be provided by law. The notice shall state the office, and the time and place for filing declarations of candidacy.

NEW SECTION. Sec. 164. A new section is added to chapter 29A.24 RCW to read as follows:

Filings to fill a void in candidacy for nonpartisan office must be made in the same manner and with the same official as required during the regular filing period for such office, except that nominating signature petitions that may be required of candidates filing for certain district offices during the normal filing period may not be required of candidates filing during the special three-day filing period.

NEW SECTION. Sec. 165. A new section is added to chapter 29A.24 RCW to read as follows:

Filings for a nonpartisan office shall be reopened for a period of three normal business days, such three day period to be fixed by the election officer with whom such declarations of candidacy are filed and notice thereof given by notifying press, radio, and television in the county and by such other means as may now or hereafter be provided by law whenever before the sixth Tuesday prior to a primary:

(1) A void in candidacy occurs;

(2) A vacancy occurs in any nonpartisan office leaving an unexpired term to be filled by an election for which filings have not been held; or

(3) A nominee for judge of the superior court entitled to a certificate of election pursuant to Article 4, section 29, Amendment 41 of the state Constitution, dies or is disqualified.

Candidacies validly filed within said three-day period shall appear on the ballot as if made during the earlier filing period.

NEW SECTION. Sec. 166. A new section is added to chapter 29A.24 RCW to read as follows:

Filings for a nonpartisan office (other than judge of the supreme court or superintendent of public instruction) shall be reopened for a period of three normal business days, such three day period to be fixed by the election officer with whom such declarations of candidacy are filed and notice thereof given by notifying press, radio, and television in the county and by such other means as may now or hereafter be provided by law, when:

(1) A void in candidacy for such nonpartisan office occurs on or after the sixth Tuesday prior to a primary but prior to the sixth Tuesday before an election; or

(2) A nominee for judge of the superior court eligible after a contested primary for a certificate of election by Article 4, section 29, Amendment 41 of the state Constitution, dies or is disqualified within the ten day period immediately following the last day allotted for a candidate to withdraw; or

(3) A vacancy occurs in any nonpartisan office on or after the sixth Tuesday prior to a primary but prior to the sixth Tuesday before an election leaving an unexpired term to be filled by an election for which filings have not been held.

The candidate receiving a plurality of the votes cast for that office in the general election shall be deemed elected.

NEW SECTION. Sec. 167. A new section is added to chapter 29A.24 RCW to read as follows:

A scheduled election shall be lapsed, the office deemed stricken from the ballot, no purported write-in votes counted, and no candidate certified as elected, when:

(1) In an election for judge of the supreme court or superintendent of public instruction, a void in candidacy occurs on or after the sixth Tuesday prior to a primary, public filings and the primary being an indispensable phase of the election process for such offices;

(2) Except as otherwise specified in section 166 of this act, a nominee for judge of the superior court entitled to a certificate of election pursuant to Article 4, section 29, Amendment 41 of the state Constitution dies or is disqualified on or after the sixth Tuesday prior to a primary;

(3) In other elections for nonpartisan office a void in candidacy occurs or a vacancy occurs involving an unexpired term to be filled on or after the sixth Tuesday prior to an election.

NEW SECTION. Sec. 168. A new section is added to chapter 29A.32 RCW to read as follows:

(1) The maximum number of words for statements submitted by candidates is as follows: State representative, one hundred words; state senator, judge of the superior court, judge of the court of appeals, justice of the supreme court, and all state offices voted upon throughout the state, except that of governor, two hundred words; president and

vice president, United States senator, United States representative, and governor, three hundred words.

(2) Arguments written by committees under RCW 29A.32.060 may not exceed two hundred fifty words in length.

(3) Rebuttal arguments written by committees may not exceed seventy-five words in length.

(4) The secretary of state shall allocate space in the pamphlet based on the number of candidates or nominees for each office.

NEW SECTION. Sec. 169. A new section is added to chapter 29A.36 RCW to read as follows:

(1) Except as provided to the contrary in RCW 82.14.036, 82.46.021, or 82.80.090, the ballot title of any referendum filed on an enactment or portion of an enactment of a local government and any other question submitted to the voters of a local government consists of three elements: (a) An identification of the enacting legislative body and a statement of the subject matter; (b) a concise description of the measure; and (c) a question. The ballot title must conform with the requirements and be displayed substantially as provided under RCW 29A.72.050, except that the concise description must not exceed seventy-five words. If the local governmental unit is a city or a town, the concise statement shall be prepared by the city or town attorney. If the local governmental unit is a county, the concise statement shall be prepared by the prosecuting attorney of the county. If the unit is a unit of local government other than a city, town, or county, the concise statement shall be prepared by

the prosecuting attorney of the county within which the majority area of the unit is located.

(2) A referendum measure on the enactment of a unit of local government shall be advertised in the manner provided for nominees for elective office.

(3) Subsection (1) of this section does not apply if another provision of law specifies the ballot title for a specific type of ballot question or proposition.

NEW SECTION. Sec. 170. A new section is added to chapter 29A.36 RCW to read as follows:

(1) Except as provided in RCW 29A.36.180 and in subsection (2) of this section, on the ballot at the general election for a nonpartisan office for which a primary was held, only the names of the candidate who received the greatest number of votes and the candidate who received the next greatest number of votes for that office shall appear under the title of that office, and the names shall appear in that order. If a primary was conducted, no candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding primary. On the ballot at the general election for any other nonpartisan office for which no primary was held, the names of the candidates shall be listed in the order determined under section 130 of this act.

(2) On the ballot at the general election for the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, judge of the district court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office

or position, only the name of that candidate may be printed under the title of the office for that position.

NEW SECTION. Sec. 171. A new section is added to chapter 29A.36 RCW to read as follows:

The names of the persons certified as nominees by the secretary of state or the county canvassing board shall be printed on the ballot at 15 the ensuing election.

No name of any candidate whose nomination at a primary is required by law shall be placed upon the ballot at a general or special election unless it appears upon the certificate of either (1) the secretary of state, or (2) the county canvassing board, or (3) a minor party convention or the state or county central committee of a major political party to fill a vacancy on its ticket under section 192 of this act.

Excluding the office of precinct committee officer or a temporary elected position such as a charter review board member or freeholder, a candidate's name shall not appear more than once upon a ballot for a position regularly nominated or elected at the same election.

NEW SECTION. Sec. 172. A new section is added to chapter 29A.52 RCW to read as follows:

Whenever it shall be necessary to hold a special election in an odd-numbered year to fill an unexpired term of any office which is scheduled to be voted upon for a full term in an even-numbered year, no September primary election shall be held in the odd-numbered year if, after the last day allowed for candidates to withdraw, either of the following circumstances exist:

(1) No more than one candidate of each qualified political party has filed a declaration of candidacy for the same partisan office to be filled; or

(2) No more than two candidates have filed a declaration of candidacy for a single nonpartisan office to be filled.

In either event, the officer with whom the declarations of candidacy were filed shall immediately notify all candidates concerned and the names of the candidates that would have been printed upon the September primary ballot, but for the provisions of this section, shall be printed as nominees for the positions sought upon the November general election ballot.

NEW SECTION. Sec. 173. A new section is added to chapter 29A.52 RCW to read as follows:

Candidates for the following offices shall be nominated at partisan primaries held pursuant to the provisions of this chapter:

(1) Congressional offices;

(2) All state offices except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices where a county home rule charter provides otherwise.

NEW SECTION. Sec. 174. A new section is added to chapter 29A.52 RCW to read as follows:

The offices of superintendent of public instruction, justice of the supreme court, judge of the court of appeals, judge of the superior court, and

judge of the district court shall be nonpartisan and the candidates therefor shall be nominated and elected as such.

All city, town, and special purpose district elective offices shall be nonpartisan and the candidates therefor shall be nominated and elected as such.

NEW SECTION. Sec. 175. A new section is added to chapter 29A.52 RCW to read as follows:

Except as provided in RCW 29A.32.260, notice for any state, county, district, or municipal election, whether special or general, must be given by at least one publication not more than ten nor less than three days before the election by the county auditor or the officer conducting the election as the case may be, in one or more newspapers of general circulation within the county. The legal notice must contain the title of each office under the proper party designation, the names and addresses of all officers who have been nominated for an office to be voted upon at that election, together with the ballot titles of all measures, the hours during which the polls will be open, and the polling places for each precinct, giving the address of each polling place. The names of all candidates for nonpartisan offices must be published separately with designation of the offices for which they are candidates but without party designation. This is the only notice required for a state, county, district, or municipal general or special election and supersedes the provisions of any and all other statutes, whether general or special in nature, having different requirements for the giving of notice of any general or special elections.

NEW SECTION. Sec. 176. A new section is added to chapter 29A.60 RCW to read as follows:

(1) If the requisite number of any federal, state, county, city, or district offices have not been nominated in a primary by reason of two or more persons having an equal and requisite number of votes for being placed on the general election ballot, the official empowered by state law to certify candidates for the general election ballot shall give notice to the several persons so having the equal and requisite number of votes to attend at the appropriate office at the time designated by that official, who shall then and there proceed publicly to decide by lot which of those persons will be declared nominated and placed on the general election ballot.

(2) If the requisite number of any federal, state, county, city, district, or precinct officers have not been elected by reason of two or more persons having an equal and highest number of votes for one and the same office, the official empowered by state law to issue the original certificate of election shall give notice to the several persons so having the highest and equal number of votes to attend at the appropriate office at the time to be appointed by that official, who shall then and there proceed publicly to decide by lot which of those persons will be declared duly elected, and the official shall make out and deliver to the person thus duly declared elected a certificate of election.

NEW SECTION. Sec. 177. A new section is added to chapter 29A.64 RCW to read as follows:

An officer of a political party or any person for whom votes were cast in a primary who was not

declared nominated may file a written application for a recount of the votes or a portion of the votes cast at that primary for all persons for whom votes were cast for nomination to that office.

An officer of a political party or any person for whom votes were cast at any election may file a written application for a recount of the votes or a portion of the votes cast at that election for all candidates for election to that office.

Any group of five or more registered voters may file a written application for a recount of the votes or a portion of the votes cast upon any question or issue. They shall designate one of the members of the group as chair and shall indicate the voting residence of each member of the group.

An application for a recount of the votes cast for an office or on a ballot measure must be filed with the officer with whom filings are made for the jurisdiction.

An application for a recount must specify whether the recount will be done manually or by the vote tally system. A recount done by the vote tally system must use programming that recounts and reports only the office or ballot measure in question. The county shall also provide for a test of the logic and accuracy of that program.

An application for a recount must be filed within three business days after the county canvassing board or secretary of state has declared the official results of the primary or election for the office or issue for which the recount is requested.

This chapter applies to the recounting of votes cast by paper ballots and to the recounting of votes recorded on ballots counted by a vote tally system.

NEW SECTION. Sec. 178. A new section is added to chapter 29A.64 RCW to read as follows:

(1) If the official canvass of all of the returns for any office at any primary or election reveals that the difference in the number of votes cast for a candidate apparently nominated or elected to any office and the number of votes cast for the closest apparently defeated opponent is less than two thousand votes and also less than one-half of one percent of the total number of votes cast for both candidates, the county canvassing board shall conduct a recount of all votes cast on that position.

(a) Whenever such a difference occurs in the number of votes cast for candidates for a position the declaration of candidacy for which was filed with the secretary of state, the secretary of state shall, within three business days of the day that the returns of the primary or election are first certified by the canvassing boards of those counties, direct those boards to recount all votes cast on the position.

(b) If the difference in the number of votes cast for the apparent winner and the closest apparently defeated opponent is less than one hundred fifty votes and also less than one-fourth of one percent of the total number of votes cast for both candidates, the votes shall be recounted manually or as provided in subsection (3) of this section.

(2) A mandatory recount shall be conducted in the manner provided by RCW 29A.64.030, and

sections 179 and 180 of this act. No cost of a mandatory recount may be charged to any candidate.

(3) The apparent winner and closest apparently defeated opponent for an office for which a manual recount is required under subsection (1)(b) of this section may select an alternative method of conducting the recount. To select such an alternative, the two candidates shall agree to the alternative in a signed, written statement filed with the election official for the office. The recount shall be conducted using the alternative method if: It is suited to the balloting system that was used for casting the votes for the office; it involves the use of a vote tallying system that is approved for use in this state by the secretary of state; and the vote tallying system is readily available in each county required to conduct the recount. If more than one balloting system was used in casting votes for the office, an alternative to a manual recount may be selected for each system.

NEW SECTION. Sec. 179. A new section is added to chapter 29A.64 RCW to read as follows:

(1) At the time and place established for a recount, the canvassing board or its duly authorized representatives, in the presence of all witnesses who may be in attendance, shall open the sealed containers containing the ballots to be recounted, and shall recount the votes for the offices or issues for which the recount has been ordered. Ballots shall be handled only by the members of the canvassing board or their duly authorized representatives.

Witnesses shall be permitted to observe the ballots and the process of tabulating the votes, but they shall not be permitted to handle the ballots. The

canvassing board shall not permit the tabulation of votes for any nomination, election, or issue other than the ones for which a recount was applied for or required.

(2) At any time before the ballots from all of the precincts listed in the application for the recount have been recounted, the applicant may file with the board a written request to stop the recount.

(3) The recount may be observed by persons representing the candidates affected by the recount or the persons representing both sides of an issue that is being recounted. The observers may not make a record of the names, addresses, or other information on the ballots, poll books, or applications for absentee ballots unless authorized by the superior court. The secretary of state or county auditor may limit the number of observers to not less than two on each side if, in his or her opinion, a greater number would cause undue delay or disruption of the recount process.

NEW SECTION. Sec. 180. A new section is added to chapter 29A.64 RCW to read as follows:

Upon completion of the canvass of a recount, the canvassing board shall prepare and certify an amended abstract showing the votes cast in each precinct for which the recount was conducted. Copies of the amended abstracts must be transmitted to the same officers who received the abstract on which the recount was based.

If the nomination, election, or issue for which the recount was conducted was submitted only to the voters of a county, the canvassing board shall file the

amended abstract with the original results of that election or primary.

If the nomination, election, or issue for which a recount was conducted was submitted to the voters of more than one county, the secretary of state shall canvass the amended abstracts and shall file an amended abstract with the original results of that election. An amended abstract certified under this section supersedes any prior abstract of the results for the same offices or issues at the same primary or election.

NEW SECTION. Sec. 181. A new section is added to chapter 29A.64 RCW to read as follows:

The canvassing board shall determine the expenses for conducting a recount of votes.

The cost of the recount shall be deducted from the amount deposited by the applicant for the recount at the time of filing the request for the recount, and the balance shall be returned to the applicant. If the costs of the recount exceed the deposit, the applicant shall pay the difference. No charges may be deducted by the canvassing board from the deposit for a recount if the recount changes the result of the nomination or election for which the recount was ordered.

NEW SECTION. Sec. 182. A new section is added to chapter 29A.68 RCW to read as follows:

Any justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper county shall, by order, require any person charged with error, wrongful act, or neglect to forthwith correct the error, desist from the wrongful

act, or perform the duty and to do as the court orders or to show cause forthwith why the error should not be corrected, the wrongful act desisted from, or the duty or order not performed, whenever it is made to appear to such justice or judge by affidavit of an elector that:

(1) An error or omission has occurred or is about to occur in printing the name of any candidate on official ballots; or

(2) An error other than as provided in subsections (1) and (3) of this section has been committed or is about to be committed in printing the ballots; or

(3) The name of any person has been or is about to be wrongfully placed upon the ballots; or

(4) A wrongful act other than as provided for in subsections (1) and (3) of this section has been performed or is about to be performed by any election officer; or

(5) Any neglect of duty on the part of an election officer other than as provided for in subsections (1) and (3) of this section has occurred or is about to occur; or

(6) An error or omission has occurred or is about to occur in the issuance of a certificate of election.

An affidavit of an elector under subsections (1) and (3) above when relating to a primary election must be filed with the appropriate court no later than the second Friday following the closing of the filing period for nominations for such office and shall be heard and finally disposed of by the court not

later than five days after the filing thereof. An affidavit of an elector under subsections (1) and (3) of this section when relating to a general election must be filed with the appropriate court no later than three days following the official certification of the primary election returns and shall be heard and finally disposed of by the court not later than five days after the filing thereof. An affidavit of an elector under subsection (6) of this section shall be filed with the appropriate court no later than ten days following the issuance of a certificate of election.

NEW SECTION. Sec. 183. A new section is added to chapter 29A.80 RCW to read as follows:

(1) Each political party organization may:

(a) Make its own rules and regulations; and

(b) Perform all functions inherent in such an organization.

(2) Only major political parties may designate candidates to appear on the state primary ballot as provided in section 191 of this act.

NEW SECTION. Sec. 184. A new section is added to chapter 29A.84 RCW to read as follows:

The following apply to persons signing nominating petitions prescribed by section 114 of this act:

(1) A person who signs a petition with any other than his or her name shall be guilty of a misdemeanor.

(2) A person shall be guilty of a misdemeanor if the person knowingly: Signs more than one petition for any single candidacy of any single

candidate; signs the petition when he or she is not a legal voter; or makes a false statement as to his or her residence.

NEW SECTION. Sec. 185. A new section is added to chapter 29A.84 RCW to read as follows:

Every person who:

(1) Knowingly provides false information on his or her declaration of candidacy or petition of nomination; or

(2) Conceals or fraudulently defaces or destroys a certificate that has been filed with an elections officer under chapter 29A.20 RCW or a declaration of candidacy or petition of nomination that has been filed with an elections officer, or any part of such a certificate, declaration, or petition, is guilty of a class C felony punishable under RCW 9A.20.021.

NEW SECTION. Sec. 186. A new section is added to chapter 29A.84 RCW to read as follows:

Every person who:

(1) Knowingly and falsely issues a certificate of nomination or election; or

(2) Knowingly provides false information on a certificate which must be filed with an elections officer under chapter 29A.20 RCW, is guilty of a class C felony punishable under RCW 9A.20.021.

NEW SECTION. Sec. 187. A new section is added to chapter 29A.04 RCW to read as follows:

"September primary" means the primary election held in September to nominate candidates to be voted for at the ensuing election.

NEW SECTION. Sec. 188 A new section is added to chapter 29A.20 RCW to read as follows:

A "convention" for the purposes of this chapter, is an organized assemblage of registered voters representing an independent candidate or candidates or a new or minor political party, organization, or principle. As used in this chapter, the term "election jurisdiction" shall mean the state or any political subdivision or jurisdiction of the state from which partisan officials are elected. This term shall include county commissioner districts or council districts for members of a county legislative authority, counties for county officials who are nominated and elected on a county-wide basis, legislative districts for members of the legislature, congressional districts for members of Congress, and the state for president and vice president, members of the United States senate, and state officials who are elected on a statewide basis.

NEW SECTION. Sec. 189. A new section is added to chapter 29A.20 RCW to read as follows:

Each minor party or independent candidate must publish a notice in a newspaper of general circulation within the county in which the party or the candidate intends to hold a convention. The notice must appear at least ten days before the convention is to be held, and shall state the date, time, and place of the convention. Additionally, it shall include the mailing address of the person or organization sponsoring the convention.

NEW SECTION. Sec. 190. A new section is added to chapter 29A.24 RCW to read as follows:

If after both the normal filing period and special three day filing period as provided by sections 165 and 166 of this act have passed, no candidate has filed for any single city, town, or district position to be filled, the election for such position shall be deemed lapsed, the office deemed stricken from the ballot and no write-in votes counted. In such instance, the incumbent occupying such position shall remain in office and continue to serve until a successor is elected at the next election when such positions are voted upon.

NEW SECTION. Sec. 191. A new section is added to chapter 29A.28 RCW to read as follows:

If a place on the ticket of a major political party is vacant because no person has filed for nomination as the candidate of that major political party, after the last day allowed for candidates to withdraw as provided by section 115 of this act, and if the vacancy is for a state or county office to be voted on solely by the electors of a single county, the county central committee of the major political party may select and certify a candidate to fill the vacancy. If the vacancy is for any other office the state central committee of the major political party may select and certify a candidate to fill the vacancy. The certificate must set forth the cause of the vacancy, the name of the person nominated, the office for which the person is nominated, and other pertinent information required in an ordinary certificate of nomination and be filed in the proper office no later than the first Friday after the last day allowed for candidates to

withdraw, together with the candidate's fee applicable to that office and a declaration of candidacy.

NEW SECTION. Sec. 192. A new section is added to chapter 29A.28 RCW to read as follows:

A vacancy caused by the death or disqualification of any candidate or nominee of a major or minor political party may be filled at any time up to and including the day prior to the election for that position. For state partisan offices in any political subdivision voted on solely by electors of a single county, an individual shall be appointed to fill such vacancy by the county central committee in the case of a major political party or by the state central committee or comparable governing body in the case of a minor political party. For other partisan offices, including federal or statewide offices, an individual shall be appointed to fill such vacancy by the state central committee or comparable governing body of the appropriate political party.

If the vacancy occurs no later than the sixth Tuesday prior to the state primary or general election concerned and the ballots have been printed, it shall be mandatory that they be corrected by the appropriate election officers. In making such correction, it shall not be necessary to reprint complete ballots if any other less expensive technique can be used and the resulting correction is reasonably clear.

If the vacancy occurs after the sixth Tuesday prior to the state primary or general election and time does not exist in which to correct ballots (including absentee ballots), either in total or in part,

then the votes cast or recorded for the person who has died or become disqualified shall be counted for the person who has been named to fill such vacancy.

When the secretary of state is the person with whom the appointment by the major or minor political party is filed, the secretary shall, in certifying candidates or nominations to the various county officers insert the name of the person appointed to fill a vacancy.

If the secretary of state has already sent forth the certificate when the appointment to fill a vacancy is filed, the secretary shall forthwith certify to the county auditors of the proper counties the name and place of residence of the person appointed to fill a vacancy, the office for which the person is a candidate or nominee, the party the person represents, and all other pertinent facts pertaining to the vacancy.

NEW SECTION. Sec. 193. The following acts or parts of acts are each repealed:

(1) RCW 29A.04.007 (Ballot and related terms) and 2003 c 111 s 102, 1994 c 57 s 2, 1990 c 59 s 2, & 1977 ex.s. c 361 s 1;

(2) RCW 29A.04.085 (Major political party) and section 3 of this act, 2003 c 111 s 115, 1977 ex.s. c 329 s 9, & 1965 c 9 s 29.01.090;

(3) RCW 29A.04.127 (Primary) and section 5 of this act & 2003 c 111 s 122;

(4) RCW 29A.04.215 (County auditor--Duties--Exceptions) and 2003 c 111 s 134, 1987 c 295 s 1, 1977 ex.s. c 361 s 2, 1971 ex.s. c 202 s 1, 1965 c 123 s 1, & 1965 c 9 s 29.04.020;

(5) RCW 29A.04.310 (Primaries) and section 6 of this act, 2003 c 111 s 143, 1977 ex.s. c 361 s 29, 1965 ex.s. c 103 s 6, & 1965 c 9 s 29.13.070;

(6) RCW 29A.04.320 (State and local general elections—Statewide general election--Exceptions--Special county elections) and 2003 c 111 s 144, 1994 c 142 s 1, 1992 c 37 s 1, 1989 c 4 s 9 (Initiative Measure No. 99), 1980 c 3 s 1, 1975-'76 2nd ex.s. c 111 s 1, 1975-'76 2nd ex.s. c 3 s 1, 1973 2nd ex.s. c 36 s 1, 1973 c 4 s 1, 1965 c 123 s 2, & 1965 c 9 s 29.13.010;

(7) RCW 29A.04.610 (Rules by secretary of state) and 2003 c 111 s 161, 1971 ex.s. c 202 s 2, & 1965 c 9 s 29.04.080;

(8) RCW 29A.12.100 (Requirements of tallying systems for approval) and 2003 c 111 s 310;

(9) RCW 29A.20.020 (Qualifications for filing, appearance on ballot) and section 7 of this act, 2004 c (Senate Bill No. 6417) s 11, 2003 c 111 s 502, 1999 c 298 s 9, 1993 c 317 s 10, & 1991 c 178 s 1;

(10) RCW 29A.20.120 (Nomination by convention or write-in--Dates--Special filing period) and section 8 of this act & 2003 c 111 s 506;

(11) RCW 29A.20.140 (Convention--Requirements for validity) and section 9 of this act & 2003 c 111 s 508;

(12) RCW 29A.20.150 (Nominating petition--Requirements) and section 10 of this act & 2003 c 111 s 509;

(13) RCW 29A.20.160 (Certificate of nomination--Requisites) and section 11 of this act,

2003 c 111 s 510, 1989 c 215 s 4, 1977 ex.s. c 329 s 4, & 1965 c 9 s 29.24.040;

(14) RCW 29A.20.170 (Multiple certificates of nomination) and section 12 of this act & 2003 c 111 s 511;

(15) RCW 29A.20.180 (Presidential electors--Selection at convention) and section 13 of this act & 2003 c 111 s 512;

(16) RCW 29A.20.190 (Certificate of nomination—Checking signatures--Appeal of determination) and section 14 of this act & 2003 c 111 s 513;

(17) RCW 29A.24.030 (Declaration of candidacy) and section 15 of this act, 2003 c 111 s 603, 2002 c 140 s 1, & 1990 c 59 s 82.

(18) RCW 29A.24.080 (Declaration--Filing by mail) and section 17 of this act & 2003 c 111 s 608;

(19) RCW 29A.24.090 (Declaration--Fees and petitions) and section 18 of this act & 2003 c 111 s 609;

(20) RCW 29A.24.100 (Nominating petition--Form) and section 19 of this act, 2003 c 111 s 610, & 1984 c 142 s 5;

(21) RCW 29A.24.110 (Petitions--Rejection--Acceptance, canvass of signatures--Judicial review) and section 20 of this act & 2003 c 111 s 611;

(22) RCW 29A.24.130 (Withdrawal of candidacy) and 2003 c 111 s 613;

(23) RCW 29A.24.140 (Void in candidacy--Exception) and section 21 of this act & 2003 c 111 s 614;

(24) RCW 29A.24.150 (Notice of void in candidacy) and section 22 of this act & 2003 c 111 s 615;

(25) RCW 29A.24.160 (Filings to fill void in candidacy--How made) and section 23 of this act, 2003 c 111 s 616, & 1972 ex.s. c 61 s 6;

(26) RCW 29A.24.170 (Reopening of filing--Before sixth Tuesday before primary) and section 24 of this act & 2003 c 111 s 617;

(27) RCW 29A.24.180 (Reopening of filing--After sixth Tuesday before primary) and section 25 of this act & 2003 c 111 s 618;

(28) RCW 29A.24.190 (Scheduled election lapses, when) and section 26 of this act, 2003 c 111 s 619, 2002 c 108 s 1, 1975-'76 2nd ex.s. c 120 s 12, & 1972 ex.s. c 61 s 4;

(29) RCW 29A.24.310 (Write-in voting--Candidates, declaration) and section 27 of this act, 2003 c 111 s 622, 1999 c 157 s 1, 1995 c 158 s 1, 1990 c 59 s 100, & 1988 c 181 s 1;

(30) RCW 29A.28.040 (Congress--Special election) and section 29 of this act, 2003 c 111 s 704, 1990 c 59 s 105, 1985 c 45 s 4, 1973 2nd ex.s. c 36 s 3, & 1965 c 9 s 29.68.080;

(31) RCW 29A.28.060 (Congress--General, primary election laws to apply--Time deadlines, modifications) and section 30 of this act, 2003 c 111 s 706, 1985 c 45 s 7, & 1965 c 9 s 29.68.130;

(32) RCW 29A.28.070 (Precinct committee officer) and 2003 c 111 s 707;

(33) RCW 29A.32.030 (Contents) and section 31 of this act & 2003 c 111 s 803;

(34) RCW 29A.32.120 (Candidates' statements--Length) and section 32 of this act, 2004 c (Senate Bill No. 6417) s 12, 2003 c 254 s 6, 2003 c 111 s 812, & 1999 c 260 s 11;

(35) RCW 29A.32.240 (Contents) and 2003 c 111 s 816 & 1984 c 106 s 6;

(36) RCW 29A.36.010 (Certifying primary candidates) and section 33 of this act & 2003 c 111 s 901;

(37) RCW 29A.36.070 (Local measures--Ballot title--Formulation--Advertising) and section 34 of this act & 2003 c 111 s 907;

(38) RCW 29A.36.100 (Names on primary ballot) and section 35 of this act, 2003 c 111 s 910, & 1990 c 59 s 93;

(39) RCW 29A.36.110 (Uniformity, arrangement, contents required) and 2003 c 111 s 911;

(40) RCW 29A.36.120 (Order of offices and issues--Party indication) and 2003 c 111 s 912;

(41) RCW 29A.36.130 (Order of candidates on ballots) and 2003 c 111 s 913;

(42) RCW 29A.36.140 (Primaries--Rotating names of candidates) and 2003 c 111 s 914;

(43) RCW 29A.36.150 (Sample ballots) and 2003 c 111 s 915;

(44) RCW 29A.36.160 (Arrangement of instructions, measures, offices--Order of candidates--Numbering of ballots) and 2003 c 111 s 916, 1990 c 59 s 13, 1986 c 167 s 11, 1982 c 121 s 1, & 1977 ex.s. c 361 s 60;

(45) RCW 29A.36.170 (Nonpartisan candidates qualified for general election) and section 36 of this act, 2004 c ... (Senate Bill No. 6518) s 1, & 2003 c 111 s 917;

(46) RCW 29A.36.200 (Names qualified to appear on election ballot) and section 37 of this act & 2003 c 111 s 920;

(47) RCW 29A.40.060 (Issuance of ballot and other materials) and 2003 c 111 s 1006, 2001 c 241 s 6, & 1991 c 81 s 31;

(48) RCW 29A.40.090 (Envelopes and instructions) and 2003 c 111 s 1009;

(49) RCW 29A.44.200 (Issuing ballot to voter--Challenge) and 2003 c 111 s 1119, 1990 c 59 s 40, & 1965 c 9 s 29.51.050;

(50) RCW 29A.44.220 (Casting vote) and 2003 c 111 s 1121, 1990 c 59 s 43, 1988 c 181 s 4, 1965 ex.s. c 101 s 15, & 1965 c 9 s 29.51.100;

(51) RCW 29A.44.230 (Record of participation) and 2003 c 111 s 1122;

(52) RCW 29A.52.010 (Elections to fill unexpired term--No primary, when) and section 38 of this act & 2003 c 111 s 1301;

(53) RCW 29A.52.110 (Application of chapter) and section 39 of this act & 2003 c 111 s 1302;

(54) RCW 29A.52.120 (General election laws govern primaries) and 2003 c 111 s 1303;

(55) RCW 29A.52.230 (Nonpartisan offices specified) and section 41 of this act & 2003 c 111 s 1307;

(56) RCW 29A.52.310 (Notice of primary) and 2003 c 111 s 1309 & 1965 c 9 s 29.27.030;

(57) RCW 29A.52.320 (Certification of nominees) and section 42 of this act & 2003 c 111 s 1310;

(58) RCW 29A.52.350 (Election--Certification of measures) and section 43 of this act, 2003 c 111 s 1313, 1999 c 4 s 1, 1984 c 106 s 12, 1980 c 35 s 8, & 1965 c 9 s 29.27.080;

(59) RCW 29A.60.020 (Write-in voting--Declaration of candidacy--Counting of vote) and section 44 of this act & 2003 c 111 s 1502;

(60) RCW 29A.60.220 (Tie in primary or final election) and section 45 of this act, 2003 c 111 s 1522, & 1965 c 9 s 29.62.080;

(61) RCW 29A.64.010 (Application--Requirements--Application of chapter) and section 46 of this act, 2003 c 111 s 1601, 2001 c 225 s 3, 1987 c 54 s 3, 1977 ex.s. c 361 s 98, & 1965 c 9 s 29.64.010;

(62) RCW 29A.64.020 (Mandatory) and section 47 of this act & 2003 c 111 s 1602;

(63) RCW 29A.64.040 (Procedure--Observers--Request to stop) and section 48 of this act & 2003 c 111 s 1604;

(64) RCW 29A.64.060 (Amended abstracts) and section 49 of this act & 2003 c 111 s 1606;

(65) RCW 29A.64.080 (Expenses--Charges) and section 50 of this act & 2003 c 111 s 1608;

(66) RCW 29A.68.010 (Prevention and correction of election frauds and errors) and section 51 of this act & 2003 c 111 s 1701;

(67) RCW 29A.80.010 (Authority--Generally) and section 52 of this act, 2003 c 111 s 2001, 1977 ex.s. c 329 s 16, & 1965 c 9 s 29.42.010;

(68) RCW 29A.80.040 (Precinct committee officer, eligibility) and 2003 c 111 s 2004;

(69) RCW 29A.80.050 (Precinct committee officer--Election--Declaration of candidacy, fee--Term) and 2003 c 111 s 2005, 1991 c 363 s 34, 1987 c 295 s 14, 1973 c 4 s 7, 1967 ex.s. c 32 s 2, 1965 ex.s. c 103 s 3, & 1965 c 9 s 29.42.050;

(70) RCW 29A.80.060 (Legislative district chair--Election--Term--Removal) and 2003 c 111 s 2006, 1991 c 363 s 35, 1987 c 295 s 15, & 1967 ex.s. c 32 s 1;

(71) RCW 29A.84.260 (Petitions--Improperly signing) and section 53 of this act & 2003 c 111 s 2114;

(72) RCW 29A.84.310 (Candidacy declarations, nominating petitions) and section 54 of this act & 2003 c 111 s 2117;

(73) RCW 29A.84.710 (Documents regarding nomination, election, candidacy--Frauds and falsehoods) and section 55 of this act, 2003 c 111 s 2137, 1991 c 81 s 8, & 1965 c 9 s 29.85.100;

(74) Section 1 of this act;

(75) Section 2 of this act;

(76) Section 4 of this act;

(77) Section 28 of this act; and

(78) Section 40 of this act.

PART 3 - MISCELLANEOUS PROVISIONS

***NEW SECTION.** Sec. 201. Sections 102 through 193 of this act take effect the June 1st following the secretary of state issuing a notification that no qualifying primary may be held in this state.

*Sec. 201 was vetoed. See message at end of chapter.

NEW SECTION. Sec. 202. The code reviser shall correct any internal references accordingly if sections 102 through 193 of this act take effect.

NEW SECTION. Sec. 203. Part headings used in this act are not any part of the law.

NEW SECTION. Sec. 204. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 205. Except for sections 102 through 193 of this act, this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

Passed by the Senate March 10, 2004.

Passed by the House March 8, 2004.

Approved by the Governor April 1, 2004, with the exception of certain items that were vetoed.

Filed in Office of Secretary of State April 1, 2004.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to sections 1 through 57, section 101 and section 201, Engrossed Senate Bill No. 6453 entitled:

"AN ACT Relating to a qualifying primary;"

This bill would create a so-called "modified blanket primary" in which each candidate would self-designate a political party of that candidate's choosing to appear with his or her name on the ballot, each voter could vote for any candidate listed on the resulting ballot, and the top two candidates receiving the most votes would advance to the general election with their political party self-designation. The bill would also provide as an alternative the "open primary/private choice" system, where voters choose among candidates of one political party in the primary, and where those choices are private.

At the outset, I must reiterate my extreme frustration and disappointment with the State Republican and Democratic parties for challenging the constitutionality of our blanket primary. The blanket primary has served our state well for almost seventy years. Nonetheless, as a result of the parties' action, the United States Court of Appeals for the Ninth Circuit has ruled that the blanket primary

violates the First Amendment rights of the political parties, and the Supreme Court of the United States has chosen to let that decision stand as law. As Governor, I must respect both the letter and the spirit of the federal courts' rulings while ensuring that the state of Washington has an effective and constitutional replacement to the invalidated blanket primary in time for the September 14, 2004 primary election. As demonstrated by their actions and reflected in their deliberations, I know the Legislature and Secretary of State share my goal of ensuring we have a viable replacement for the blanket primary in time for the 2004 primary election.

The Legislature, in passing ESB 6453, knowingly forwarded to me two alternatives to the blanket primary system. Both alternatives are less than ideal, but for the reasons set forth below I am choosing the open primary/private choice system, which I believe better preserves voter choice in the general election, provides more certainty with regard to the state's authority to conduct the primary election, and presents less likelihood that our state's new primary system will be challenged in, or delayed or rewritten by, the federal courts.

During the legislative session, I consistently raised concerns about the "modified blanket primary," which would advance to the general election only the two candidates, regardless of party, who receive the most votes in the primary. I believe this option would frustrate many voters' expectations by removing from the general election the ability to choose from a list of candidates representing a broad political spectrum. The level of participation is almost twice

as high in the general election than in the primary. In 1996, 1,043,000 more citizens participated in the general election than in the primary. In 2000, 1,197,000 more citizens participated in the general election than in the primary. In 2002, a year with no statewide races on the ballot other than judicial elections, 700,000 more citizens participated in the general election than in the primary. The scope of these voters' disenfranchisement in the general election would be enormous if they were forced to select from a ballot with no candidate representing either their preferred party or their general political views.

The modified blanket primary would also hurt the ability of minority and independent candidates to engage the electorate by effectively denying them access to the general election ballot. In 2000, for example, no fewer than eight political parties were represented on the general election ballot for statewide and legislative races, not including independent candidates. Minority parties bring diverse perspectives to political debate and additional choice to voters. They should not be foreclosed from meaningful participation in the democratic process.

Moreover, I believe that adoption of the modified blanket primary would almost certainly result in major parties nominating their candidates through caucuses and embroiling the state in lengthy litigation over the use of party labels by candidates who have not been nominated according to party rules. The legislation as passed acknowledges doubts about the constitutionality of the modified blanket primary system by providing that if a court finds

that candidates cannot use party labels unless nominated by the parties, then the state shall move to an open primary/private choice system, similar to that used in Montana. However, for a variety of reasons, including a requirement that all appeals be exhausted before this alternative may go into effect, the provision for triggering that contingency is fundamentally flawed.

Finally, there is a distinct likelihood that the political parties would promptly block the modified blanket primary in federal court. This year, next year, and until final judicial resolution, we would have a primary system written and imposed by the federal courts, and which does not respect our voters' desire for privacy. Our state deserves to have in place immediately a system that is one of the two alternative primary systems written and enacted by the Washington Legislature – not one written and imposed by the federal courts at the urging of the major political parties.

Because of these concerns, I am persuaded that the open primary/private choice alternative in the bill presented to me by the Legislature is the better -- and more legally viable -- alternative, and the one that we should implement without delay. Under this option, candidates qualify for the general election through a process in which voters are not required to register with a party, but choose among candidates of a single party, with their choice of ballot neither public information nor a public record. I believe this alternative protects voter privacy, offers voter choice consistent with the federal court ruling, and provides county auditors with a system that can be administered without undue complexity.

Section 205 expresses the intent of the Legislature that the adoption of a new primary system is necessary for the immediate preservation of the public peace, health, or safety, and the support of the state government and its existing public institutions; that enactment should take effect immediately, and that the new system should not be subject to being put on hold by referendum. I wholeheartedly concur. The integrity and smooth operation of our electoral processes are at the core of our democratic form of government. Indeed, men and women in uniform risk their lives daily to protect our democracy, and the public institutions that support that democracy.

Many public officials and concerned citizens have suggested that if no new primary system were put in place this legislative session, confusion as to election processes would occur in the fall. The Secretary of State has suggested that he would cancel the primary if a replacement law was not enacted or if the law was suspended because of referral to the general election ballot. In the September 2000 primary, more than 1.3 million voters expressed their preference as to which candidate should represent each party in the general election. With open seats for Governor, Attorney General and Congress, the primary election to determine which candidates appear on the general election ballot will likely draw even more voters. No elected official has any intention of creating a risk that more than a million voters will be denied the opportunity to have a public primary to determine the general election candidates. To the contrary, everyone involved in the legislative process for this bill has recognized the urgency of having a constitutional primary system in

place for the September 14, 2004 primary, and the emergency nature of this legislation. Moreover, I am aware that county auditors need to know by early summer the laws they must implement so that they can prepare for the primary election this September. For these reasons, I agree with the Legislature that this bill should go into effect immediately and not be subject to being put on hold by referendum.

The emergency declaration in section 205 applies in these circumstances to the entire bill as I have signed it into law. Any other reading would thwart the manifest purpose of the Legislature and lead to an absurd result. Obviously, the reference to sections 102 through 193 was intended only to apply if the bill signed into law had multiple inconsistent primary systems. With my veto actions, however, this is not the case.

Some have urged me to veto section 205 to remove what they see as an ambiguous reference to sections 102 through 193, but doing so might create an unintended but more significant ambiguity with respect to whether an emergency need for a primary system exists. I have not done that because, as all of us involved in the legislative process for this bill recognize, assuring that the primary system established by this bill takes effect for the upcoming September 14, 2004 primary is of utmost urgency to the public and democratic self-governance in our state.

Accordingly, I have left section 205 in the bill because the existing text and the circumstances in which this bill was enacted make it clear beyond reasonable dispute that the intent of all concerned

was to have this bill's new primary system in place for the voters this September without risk of cancellation of this bill's primary due to any hold or delays caused by referendum.

For these reasons, I have vetoed sections 1 through 57, section 101 and section 201 of Engrossed Senate Bill No. 6453.

With the exception of sections 1 through 57, section 101, and section 201, Engrossed Senate Bill No. 6453 is approved."

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EXHIBIT C

LOGO	RULE MAKING ORDER	CR-103 (June 2004) (Implements RCW 34.05.360
Agency: Secretary of State		☐ Permanent Rule ☒ Emergency Rule
Effective date of rule: Permanent Rules ☐ 31 days after filing ☐ Other (specify) _____ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)		Effective date of rule: Emergency Rules ☒ Immediate upon filing. ☐ Later (specify) _____
Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule? ☐Yes ☒No If Yes, explain:		
Purpose: Implementation of a new top-two primary system pursuant to chapter 2, Laws of 2005.		
Citation of existing rules affected by this order: Repealed: 434-262-005 and 434-230-210 Amended: 434-208-060, 434-215-012, 434-215-070, 434-230-010, 434-230-040, 434-230-050, 424-230-060, 434-230-170, 434-261-020, 434-262-160 and 434-381-120 Suspended:		
Statutory authority for adoption: chapter 2, Laws of 2005; RCW 29A.04.611		
Other authority:		
PERMANENT RULE ONLY (Including Expedited Rule Making) Adopted under notice filed as WSR _____ on _____ (date) Describe any changes other than editing from proposed to adopted version: If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost benefit analysis is available by contacting:		

Name: Address:	phone ( )_____ fax ( )_____ e-mail _____

EMERGENCY RULE ONLY

Under RCW 34.05.350 the agency for good cause finds:

☐ That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

☒ That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for finding:

Initiative 872 created a new primary election system, known as the top-two primary. Initiative 872 passed in November 2005; chapter 2, Laws of 2005. The top-two primary conflicts with the nominating primary still described in statute. Because the Secretary of State is legally obligated to implement the new law, and because implementing legislation did not pass during the 2005 legislative session, the Secretary of State must implement the new primary through emergency rule making. The standard rule making process will not allow the rules to take effect until September 2005, after the election cycle has begun.

Date adopted: May 18, 2005	CODE REVISOR USE ONLY MAY 18 2005
NAME (TYPE OR PRINT) Steve Excell	
SIGNATURE /s/	
TITLE Assistant Secretary of State	

(COMPLETE REVERSE SIDE)

Note: If any category is left blank, it will be calculated as zero.
No descriptive text.

Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New ___	Amended ___	Repealed ___
Federal rules or standards:	New ___	Amended ___	Repealed ___
Recently enacted state statutes:	New 4	Amended 9	Repealed ___

The number of sections adopted at the request of a nongovernmental entity:

New ___ Amended ___ Repealed ___

The number of sections adopted in the agency's own initiative:

New ___ Amended 2 Repealed 2

The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New ___ Amended ___ Repealed ___

The number of sections adopted using:

Negotiated rule making	New ___	Amended ___	Repealed ___
Pilot rule making:	New ___	Amended ___	Repealed ___
Other alternative rule making:	New ___	Amended ___	Repealed ___

AMENDATORY SECTION (Amending WSR 04-15-089, filed 7/16/04, effective 8/16/04)

WAC 434-208-060 Filing of electronic facsimile documents. In addition to those documents specified by RCW 29A.04.255, the secretary of state or the county auditor shall accept and file in his or her office electronic facsimile transmissions of the following documents:

(1) The text of any proposed initiative, referendum, or recall measure and any accompanying documents required by law;

(2) Any minor party or independent candidate filing material *for president and vice-president of the United States,* except nominating petitions;

(3) Lists of presidential electors selected by political parties or independent candidates;

(4) Voted ballots, provided the voter agrees to waive the secrecy of his or her ballot;

(5) Resolutions from cities, towns, and other districts calling for a special election; and

(6) ((~~Filling of vacancies on the ticket by a major political party,~~

~~(7)~~)) Voter registration form.

AMENDATORY SECTION (Amending WSR 02-15-156, filed 7/23/02, effective 8/23/02)

WAC 434-215-012 Declaration of candidacy ((~~Offices subject to primary~~)). Declarations of candidacy ((~~for all partisan and nonpartisan offices~~)) filed either in person or by mail shall be in substantially the following form:

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~~((STRICKEN GRAPHIC~~

FILING DATA . . *FOR OFFICE USE ONLY*

Date _____ Fee Paid $_____ File No. _____

Time _____ ☐ AM ☐ PM Paid by (check one) ☐ Check ☐ Cash ☐ Other ☐ Name, Petition Clerk/Cashier Initials _____

DECLARATION OF CANDIDACY

1. I, _____ am a registered voter residing at
PRINT NAME AS YOU ARE REGISTERED TO VOTE

2. _____ _____
STREET ADDRESS OR RURAL ROUTE TELEPHONE NUMBER

_____
MAILING ADDRESS – IF DIFFERENT

_____ _____, Washington _____
CITY COUNTY ZIP CODE

and at the time of filing this declaration I am legally qualified to assume office if elected.

3. I declare myself as a candidate for nomination to the office of:

_____
NAME OF OFFICE

_____
CONGRESSIONAL OR LEGISLATIVE DISTRICT, COUNTY, CITY, OR OTHER JURISDICTION

_____ _____
POSITION NUMBER IF APPLICABLE DIRECTOR OR COMMISSIONER CONTACT, IF ANY

4. For the following term of office:
☐ a full term or a full term and a short term, or
☐ an unexpired term

5. This office is:
☐ Nonpartisan, or
☐ Partisan, and I am: ☐ a candidate of the _____ party or an independent candidate nominate pursuant to chapter 29.24. RCW

6. Filing Fee (Check one):
☐ There is no filing fee because the office has no fixed annual salary, or
☐ I am submitting a filing fee of $10 because the fixed annual salary of the office being sought is $1,000 or less, or
☐ I am submitting a filing fee of $_____, an amount equal to 1% of the annual salary or
☐ I am without sufficient assets or income to pay the filing fee required by law and I have attached a nominating petition in lieu of this fee, pursuant to RCW 28.19.050.

7. Please print my name on the ballot exactly as follows: _____
(PLEASE PRINT)

I declare that this information is, to the best of my knowledge, true. I also swear, or affirm, that I will support the Constitution and laws of the United States and the Constitution and laws of the State of Washington.

Note: Your signature must be personally attested to by either a notary public or by the officer with whom the declaration is filed.

8. Sign Here X _____
SIGNATURE OF CANDIDATE AS REGISTERED TO VOTE

_____
SIGNATURE OF ACKNOWLEDGING OFFICIAL

_____
TITLE OF ACKNOWLEDGING OFFICIAL

Candidate: Return all copies of this declaration to your Elections Dept. Distribution by Elections Dept: White-County; Yellow-PDC; Pink-Candidate

((~~STRICKEN GRAPHIC~~

((~~STRICKEN GRAPHIC~~

FILING DATA . . . *FOR OFFICE USE ONLY*

Date _____ Fee Paid $_____ File No. _____

Paid by (check one)
☐ Check ☐ Other
☐ Cash ☐ Name, Petition Clerk/Cashier Initials _____ Office Code _____

DECLARATION OF CANDIDACY

1. I, _____ am a registered voter residing at
(PRINT NAME AS YOU ARE REGISTERED TO VOTE)

2. _____
(STREET ADDRESS OR RURAL ROUTE WHERE REGISTERED TO VOTE) (CITY) (COUNTY) (ZIP CODE)

_____
(MAILING ADDRESS) (CITY) (COUNTY) (ZIP CODE)

_____
(TELEPHONE NUMBER) (EMAIL ADDRESS)

and at the time of filing this declaration I am legally qualified to assume office if elected.

3. I declare myself as a candidate for nomination to the office of:

_____
(NAME OF OFFICE)

_____
(CONGRESSIONAL OR LEGISLATIVE DISTRICT, COUNTY, CITY, OR OTHER JURISDICTION)

_____ _____
(POSITION NUMBER IF APPLICABLE) (DIRECTOR OR COMMISSIONER CONTACT, IF ANY)

4. For the following term of office:
☐ a full term or a full term and a short term, or
☐ an unexpired term

5. This office is:
☐ Nonpartisan, or
☐ Partisan, and I am: ☐ a candidate of the _____ party or an independent candidate nominate pursuant to chapter 29.24. RCW

6. Filing Fee (Check one):
☐ There is no filing fee because the office has no fixed annual salary, or
☐ I am submitting a filing fee of $10 because the fixed annual salary of the office being sought is $1,000 or less, or
☐ I am submitting a filing fee of $_____, an amount equal to 1% of the annual salary or
☐ I am without sufficient assets or income to pay the filing fee required by law and I have attached a nominating petition in lieu of this fee, pursuant to RCW 28.19.050.

7. Please print my name on the ballot exactly as follows: _____
(PLEASE PRINT)

I declare that this information is, to the best of my knowledge, true. I also swear, or affirm, that I will support the Constitution and laws of the United States and the Constitution and laws of the State of Washington.

Note: Your signature must be personally attested to by either a notary public or by the officer with whom the declaration is filed.

8. Sign Here X _____
(SIGNATURE OF CANDIDATE AS REGISTERED TO VOTE)

SIGNED OR ATTESTED BEFORE ME ON _____

by _____
(CANDIDATE)

[SEAL OR STAMP]

_____
(SIGNATURE OF NOTARY)

_____
(TITLE)

Candidate: Return all copies of this declaration to your Elections Dept.
Distribution by Elections Dept: White-County; Yellow-PDC; Pink-Candidate

((~~STRICKEN GRAPHIC~~

FILING DATA . . . *FOR OFFICE USE ONLY*

Date _____ Fee Paid $_____ File No. _____ Office Code _____

☐ Check ☐ Debit/Credit
☐ Cash ☐ Filing Fee Petition Clerk/Cashier Initials _____

DECLARATION OF CANDIDACY

1. I, _____ am a registered voter residing at
(PRINT NAME AS YOU ARE REGISTERED TO VOTE)

2. _____
(STREET ADDRESS OR RURAL ROUTE WHERE REGISTERED TO VOTE) (CITY) (COUNTY) (ZIP CODE)

_____
(MAILING ADDRESS) (CITY) (COUNTY) (ZIP CODE)

_____
(TELEPHONE NUMBER) (EMAIL ADDRESS)

and at the time of filing this declaration I am legally qualified to assume office if elected.

3. I declare myself as a candidate for nomination to the office of:

_____
(NAME OF OFFICE)

_____
(CONGRESSIONAL OR LEGISLATIVE DISTRICT, COUNTY, CITY, OR OTHER JURISDICTION)

_____
(POSITION NUMBER IF APPLICABLE) (DIRECTOR OR COMMISSIONER CONTACT, IF ANY)

4. For the following term of office:
☐ a full term or a full term and a short term, or
☐ an unexpired term

5. This office is:
☐ Nonpartisan, or

☐ Partisan, and I am: ☐ my party preference is _____ or
☐ I am an independent candidate

The party preference will be listed on the ballot exactly as provided unless limited spae necessitates abbreviation.

6. Filing Fee (Check one):
☐ There is no filing fee because the office has no fixed annual salary, or
☐ I am submitting a filing fee of $10 because the fixed annual salary of the office being sought is $1,000 or less, or
☐ I am submitting a filing fee of $_____, an amount equal to 1% of the annual salary or
☐ I am without sufficient assets or income to pay the filing fee required by law and I have attached a nominating petition in lieu of this fee, pursuant to RCW 28.19.050.

7. Please print my name on the ballot exactly as follows: _____
(PLEASE PRINT)

I declare that this information is, to the best of my knowledge, true. I also swear, or affirm, that I will support the Constitution and laws of the United States and the Constitution and laws of the State of Washington.

Note: Your signature must be personally attested to by either a notary public or by the officer with whom the declaration is filed.

8. Sign Here X _____
(SIGNATURE OF CANDIDATE AS REGISTERED TO VOTE)

SIGNED OR ATTESTED BEFORE ME ON _____

by _____
(CANDIDATE)

[SEAL OR STAMP]

_____
(SIGNATURE OF NOTARY)

_____
(TITLE)

Candidate: Return all copies of this declaration to your Elections Dept.

Candidates: Return all copies of this declaration to the filing officer. Distribution by the filing officer: White-County; Yellow-PDC; Pink-Candidate. The form shall measure eight and one-half inches by eleven inches and be printed on paper stick of good quality. The form shall also contain space for recording the date and time of filing and a sequential filing and receipt number. One copy of the form or an electronic file, in a format approved by the secretary of state and acceptable to the public disclosure commission, containing the information on the form of each properly executed and filed declaration and affidavit of candidacy shall be forwarded to the public disclosure commission as required by RCW ((~~29.15.030~~)) 29A.24.070, and one copy of the form or an electronic file containing the information on the form of each properly executed and filed declaration and affidavit of candidacy shall be returned to the candidate.

NEW SECTION

WAC 434-215-013 Filing fee petition. A candidate who lacks sufficient assets or income to pay the filing fee may submit a filing fee petition with the declaration of candidacy. The filing fee petition must meet the requirements of RCW 29A.24.091 and 29A.24.111, must be printed on sheets of uniform color and size, must include a place for each person to sign and print his or her name and voter registration address, and must contain no more than twenty numbered lines. The filing fee petition must be in substantially the following form:

The warning prescribed by RCW 29A.72.140, followed by:

We, the undersigned registered voters of (the state of Washington or the political subdivision for which the filing is made), hereby petition that the name of (candidate's name) be printed on the official primary ballot for the office of (name of office).

NEW SECTION

WAC 434-215-015 Political party preference and independent status. A candidate for partisan office who files a declaration of candidacy properly must appear on the primary election ballot, regardless of the candidate's party preference or independent status, unless the office is not subject to a primary election. Except for the offices of President and Vice-President of the United States, neither endorsement by a political party nor a nominating convention are required in order to file a declaration of candidacy and appear on the primary election ballot. A candidate for partisan office who does not provide a political party preference is deemed to be an independent candidate. An independent candidate or a candidate who lists on the declaration of candidacy a preference for a party that does not qualify as a major political party is not required to hold a convention, file a nominating petition, or file a certificate of nomination, as stated in RCW 29A.20.110 through 29A.20.201. The requirements of RCW 29A.20.110 through 29A.20.201 are limited to candidates for President and Vice-President of the United States.

AMENDATORY SECTION (Amending WSR 02-15-156, filed 7/23/02, effective 8/23/02)

WAC 434-215-070 Definition and standards for systems to file declarations of candidacy

electronically. An electronic system to file declarations of candidacy shall be an online system accessible to candidates on the world wide web that records the information specified in RCW 29.15.010(1) through (4) and WAC 434-215-090. At a minimum, the system shall perform the following functions:

(1) Verify the candidate's voter registration status;

(2) Check the candidate's name against the name returned by electronic transfer of funds process;

(3) Allow the filing officer to verify filings before filing information is made public;

(4) Accept electronic transfer of funds for the payment of filing fees required by RCW 29.15.050, except that a candidate submitting a ((~~nominating~~)) filing fee petition in the place of a filing fee may not file the declaration of candidacy electronically;

(5) Inform, and require the candidate to acknowledge, that submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitution and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in RCW 29.15.050; and

(6) Inform the candidate that knowingly providing false information on a declaration of candidacy is a class C felony as provided by RCW 29.85.100.

AMENDATORY SECTION (Amending WSR 04-15-089, filed 7/16/04 effective 8/16/04)

WAC 434-230-010 Official and sample ballots. Sample paper ballots shall be printed in substantially the same form as official ballots, but shall be a different color than the official ballot. Sample ballots for counties using electronic or mechanical voting systems shall be printed in a manner that makes them easily distinguishable from the official ballot. Sample ballots shall be available starting fifteen days prior to an election. Such sample ballots shall be made available through the office of the county auditor and at least one shall be available at all polling places on election day.

((~~Names of the candidates in each office to appear on the primary ballot shall be arranged on the sample ballot in the order provided by RCW 29A.36.120. The names of the candidates in each office to appear on the general election ballot shall be listed on the sample ballot in the order in which their names appear on the official ballot. State measures and local measures shall be in the same order as they appear on the official ballot.~~)) Positions or offices shall be arranged on all official and sample ballots in substantially the following order: State ballot measures, United States president and vice-president, United States senator, United States representative, governor, lieutenant governor, secretary of state, state treasurer, state auditor, attorney general, commissioner of public lands, superintendent of public instruction, insurance commissioner, state senator, state representative, county officers, justices of the supreme court, judges of the court of appeals, judges of superior court, and

judges of the district court. For all other jurisdictions, the offices in each jurisdiction shall be grouped together and be in the order of the position numbers assigned to those offices, if any.

The names of candidates and ballot measures shall appear on the sample ballot in the same order as they appear on the official ballot. The names of the candidates shall appear on the primary election ballot in the order determined by lot. The party preference of candidates for partisan office shall have no bearing on the order in which candidates appear on the ballot. The names of the candidates shall appear on the general election ballot according to the number of votes the candidates received in the primary election. The name of the candidate who received the greatest number of votes shall appear first and the name of the candidate who received the second greatest number of votes shall appear second. If no primary was conducted, the names of the candidates shall appear on the general election ballot in the order determined by lot.

At any primary or election when a local voters' pamphlet is published which contains a full sample ballot, a separate sample ballot need not be printed.

Counties with populations of over five hundred thousand may produce more than one sample ballot for a primary or election, each of which lists a portion of the offices and issues to be voted on at that election. Sample ballots may be printed by region or area (e.g., legislative district, municipal, or other district boundary) of the county, provided that all offices and issues to be voted upon at the election appears on at least one of the various sample ballots

printed for such county. Each regional sample ballot shall contain all offices and issues to be voted upon within that region. A given office or issue may appear on more than one sample ballot, provided it is to be voted upon within that region. Sample ballots shall be made available and distribute to each polling place and to other locations within the appropriate region or area.

NEW SECTION

WAC 434-230-035 Special filing periods for voids in candidacy and vacancies in office. Voids in candidacy, as provided in RCW 29A.24.141 through 29A.24.181, may occur for partisan as well as nonpartisan office. A three day special filing period must be opened, as provided in RCW 29A.24.171 and 29A.24.181, whether the office is partisan or nonpartisan.

Vacancies in office, as provided in RCW 29A.24.171, 29A.24.181, and 42.12.040, may be filled through a special three day filing period as provided in RCW 29A.24.171 and 29A.24.181, whether the office is partisan or nonpartisan.

A scheduled election shall lapse when a void in candidacy remains after both a normal filing period and a special three day filing period, or when a vacancy in office occurs involving an unexpired term on or after the sixth Tuesday before the general election.

If the death or disqualification of a candidate for a partisan or nonpartisan office does not give rise to the opening of a new filing period, then the following occurs:

(1) If the candidate dies or becomes disqualified after filing a declaration of candidacy but before the close of the filing period, then the declaration of candidacy is void and his or her name will not appear on the ballot;

(2) If the candidate dies or becomes disqualified after the close of the filing period but before the day of the primary, then his or her name will appear on the primary ballot and all otherwise valid votes for that candidate will be tabulated. The candidate's name will not appear on the general election ballot even if he or she otherwise would have qualified to do so, but no other candidate will advance, or be substituted, in the place of that candidate. If the candidate was the only candidate to qualify to advance to the general election, then the general election for that office lapses, and the office will be regarded as vacant as of the time the newly elected official would have otherwise taken office;

(3) If the candidate dies or becomes disqualified on or after the day of the primary, and he or she would have otherwise qualified to appear on the general election ballot, then his or her name will appear on the general election ballot and all otherwise valid votes for that candidate will be tabulated. If the candidate received a number of votes sufficient to be elected to office, but for his or her death or disqualification, then the office will be regarded as vacant as of the time the newly elected official would have otherwise taken office.

AMENDATORY SECTION (Amending WSR 97-21-045, filed 10/13/97, effective 11/13/97)

WAC 434-230-040 Candidate's political party ((~~designation~~)) preference – Primary to general. ((~~No person who has offered himself or herself as a candidate for the nomination of one party at the primary, shall have his or her name printed on the ballot of the succeeding general election as the candidate for another political party.~~)) A candidate for partisan office who indicated a party preference on the declaration of candidacy may not change the party preference between the primary election and the general election.

AMENDATORY SECTION (Amending WSR 97-21-045, filed 10/13/97, effective 11/13/97)

WAC 434-230-050 Candidate ((~~nominated by two or more political parties or~~)) eligible for two or more offices. ((~~In the event a candidate, as a result of write-in votes, is the nominee of two or more political parties for the same office, such candidate shall designate in writing, under which political party designation he or she desires to be listed on the ballot. Such written notice shall be submitted to the county auditor within three days of the certification of the primary.~~))

In the event a candidate, as a result of write-in votes in the primary, is ((~~a nominee~~)) eligible to advance to the general election for two or more offices, the candidate shall notify the county auditor within three days of the primary certification, in writing, of the single office for which he or she desires to appear on the general election ballot. Any void in candidacy for other positions thus created will be handled as provided by law.

AMENDATORY SECTION (Amending WSR 97-21-045, filed 10/13/97, effective 11/13/97)

WAC 434-230-060 Primary votes required for appearance on general election ballot. Following any ((~~nonpartisan~~)) primary, no candidate's name shall be entitled to appear on the general election ballot unless he or she receives the greatest or the next greatest number of votes for the office and additionally receives at least one percent of the total votes cast for the office.

((~~Following any partisan primary, no political party candidate's name shall be entitled to appear on the general election ballot unless he or she receives a plurality of votes cast for the candidates of his or her party for that office and additionally at least one percent of the total votes cast for the office. An independent candidate must receive one percent of the total votes cast for the office in the primary in order for his or her name to appear on the general election ballot.~~)) The filing officer shall notify, in writing, all candidates who satisfy other requirements but who fail to meet the one percent requirement of the fact that their name will not appear on the general election ballot.

((~~In those charter counties where provision is made in the county charter for the qualification of minor party and independent candidates, the charter provisions shall apply if the candidates has chosen that method for ballot qualification~~.))

AMENDATORY SECTION (Amending WSR 04-15-089, filed 7/16/04, effective 8/16/04)

WAC 434-230-170 ((~~Electronic voting devices~~)) Ballot form. Each office on the ballot shall be identified, along with a statement designating how many candidates are to be voted on for such office (e.g., vote for . . . .with the words, "one," 'two," or a spelled number). The office term shall be included on the ballot if such term is other than a full term (e.g., short/full term, two-year unexpired term, etc.). Each office shall be listed on the ballot in the manner prescribed by law or administrative rule. Following the office designation the names of all candidates for that position shall be listed ((~~together with political party designation certified by the secretary of state as provided in RCW 29A.36.010 or the word "nonpartisan," or "NP" as applicable~~)). If the position is a partisan position, the party preference or independent status of each candidate shall be listed next to the candidate. The party preference must be listed exactly as provided by the candidate on the declaration of candidacy unless limited space on the ballot necessitates abbreviation or the party description provided is, in the opinion of the county auditor, obscene. If the office encompasses more than one county, the county auditor must coordinate the appearance of the ballot with other affected counties to achieve consistency. If the position is a nonpartisan position, the word "nonpartisan" or "NP" shall be listed next to each candidate. Each office listed on the ballot shall be separated by a bold line. In a year in which a President of the United States is to be elected, the name of all candidates for President and Vice-President for each party shall be grouped together. Each group shall be enclosed in brackets

with one vote response position for each party, where the voter may indicate ((~~their~~)) his or her choice.

Candidate names and party preferences shall be printed in a type style and point size which is easily read. If a candidate's name or party preference exceeds the space provided, the election official shall take whatever steps necessary to place the name on the ballot in a manner which is readable. These steps may include using a small point size, a different type style, or setting the name in upper/lower case letters, rather than upper case, if appropriate.

For paper ballots, there shall be a box at either the left or right of the name of each candidate where the voter may indicate his or her choice.

Each position, with the candidates running for that office, shall be clearly delineated from the following one by a bold line. Following each listing of candidates shall be a blank space for writing in the name of any candidate, if desired, on the ballot card, or a write-in space provided on the ballot envelope.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 434-230-210 Paper ballots – Ballot form.

AMENDATORY SECTION (Amending WSR 04-15-089, filed 7/16/04, effective 8/16/04)

WAC 434-261-020 Counting center – Political party observers. Counting center operations shall be observed by at least one representative from each major political party, if representatives have been

appointed by the respective political parties and those representatives are present while the counting center is in operation.

Prior to the primary or election, the county auditor shall determine the number of observers required in order to observe all aspects of the counting center proceedings, and shall request, in writing, that each major political party appoint representatives to fill the requirements. Where more than one observer is to be appointed, the political party shall designate one of their observers as supervisor. Counting center observers shall be provided training with respect to ballot processing procedures and the vote tallying system as required by RCW 29A.12.120.

Before final assignment as observers, major political party representatives so appointed shall be reviewed by the county auditor, who may refuse to approve any person so appointed. In the event the auditor rejects a person designated, he or she shall promptly notify the political party concerned and request that a substitute observer be appointed, and shall ensure that the substitute observer is trained ((~~as provided in subsection (2) of this section~~)).

Representatives of the major political parties appointed as observers shall be identified by roster, including assigned observer stations if more than one in the counting center, and by identification tags which will indicate the observer's name and the party represented.

NEW SECTION

WAC 434-262-012 Partisan Primaries. Pursuant to chapter 2, Laws of 2005, a partisan primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election. The candidate who receives the highest number of votes and the candidate who receives the second highest number of votes at the primary election advance to the general election, regardless of the candidates' political party preference. The candidates also must receive at least one percent of the total votes cast for that office at the primary in order to advance to the general election.

Each voter may vote for any candidate listed on the ballot, regardless of the party preference of the candidates or the voter. Voters at the primary election are not choosing a political party's nominees.

AMENDATORY SECTION (Amending WSR 97-21-045, filed 10/13/97, effective 11/13/97)

WAC 434-262-160 Write-in-voting - Voter intent. In all cases of write-in votes the canvassing board shall exercise all reasonable efforts to determine the voter's intent. ((~~Write-in votes are to be counted where abbreviations are used for office, position, or political party.~~)) In a general election, write-in votes are not to be counted for any person who filed for the same office as either a regular or write-in candidate at the preceding primary and failed to qualify for the general election. If a ((~~write-in~~)) declaration of candidacy has been filed pursuant to RCW 29A.24.311, the voter ((~~need only~~)) must write in ((~~that~~)) the candidate's name in order for the

vote to be counted. If no declaration of ((~~write-in~~)) candidacy has been filed, the voter must write in the candidate's name ((~~of the candidate, the political party, if applicable,~~)) and, if the office and/or position number cannot be determined by the location of the write-in on the ballot, the office and position number, in order for the write-in vote to be counted.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 434-262-005 Authority and purpose.

AMENDATORY SECTION (Amending WSR 04-15-089, filed 7/16/04, effective 8/16/04)

WAC 434-381-120 Deadlines. (1) Candidate statements and photographs shall be submitted to the secretary of state:

(a) For candidates who filed during the regular filing period, within three business days after filing their declaration of candidacy;

(b) For candidates who filed during a special filing period, ((~~or were selected by a political party pursuant to either RCW 29A.52.010 or 29S.24.140,~~)) within three business days after the close of the special filing period ((~~or selection by the party~~)).

(2) For ballot measures, including initiatives, referendums, alternatives to initiatives to the legislature, and constitutional amendments, the following documents shall be filed with the secretary of state on or before the following deadlines:

(a) Appointments of the initial two members of committees to prepare arguments and for and against measures:

(i) For an initiative to the people or referendum measure: Within ten business days after the submission of signed petitions to the secretary of state;

(ii) For an initiative to the legislature, with or without an alternative, constitutional amendment or referendum bill, within ten business days after the adjournment of the regular or special session at which the legislature approved or referred the measure to the ballot:

(b) Appointment of additional members of committees to prepare arguments for and against ballot measures, not later than the date the committee submits its initial argument to the secretary of state;

(c) Arguments for or against a ballot measure, no later than twenty calendar days following appointment of the initial committee members;

(d) Rebuttals of arguments for or against a ballot measure, by no later than fourteen calendar days following the transmittal of the final statement to the committees by the secretary. The secretary shall not transmit arguments to opposing committees for the purpose of rebuttals until both arguments are complete.

(3) If a ballot measure is the product of a special session of the legislature and the secretary of state determines that the deadlines set forth in subsection (2) of this section are impractical due to

the timing of that special session, then the secretary of state may establish a schedule of deadlines unique to that measure.

(4) The deadlines stated in this rule are intended to promote the timely publication of the voters pamphlet. Nothing in this rule shall preclude the secretary of state from accepting a late filing when, in the secretary's judgment, it is reasonable to do so.

LOGO	PREPROPOSAL STATEMENT OF INQUIRY	CR-101 (June 2004) (Implements RCW 34.05.360 Do NOT use for expedited rule making

Agency: Office of the Secretary of State, Elections Division

Subject of possible rule making:

Implementation of a new top-two primary election system pursuant to chapter 2, Laws of 2005

Statutes authorizing the agency to adopt rules on this subject: chapter 2, Laws of 2005; RCW 29A.04.611

Reasons why rules on this subject may be needed and what they might accomplish:

Initiative 872 created a new primary election system, known as t he op-two primary. Initiative 872 passed in November 2005: chapter 2, Laws of 2005. The top-two primary conflicts with the nominating primary still described in statute. Because the Secretary of State is legally obligated to implement the new law, and because implementing legislation did not pass during the 2005 legislative session, the Secretary of State must implement the new primary through rule making.

Identify other federal and state agencies that regulate this subject and the process coordinating the rule with these agencies:

Process for developing new rule (check all that apply):

- X Negotiated rule making
- ☐ Pilot rule making
- ☐ Agency study
- ☐ Other (describe)

How interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication:
(List names, addresses, telephone, fax numbers, and e-mail of persons to contact; describe meetings, other exchanges of information, etc.)

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Assistant Director of Elections
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DATE
May 18, 2005

NAME (TYPE OR PRINT)
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SIGNATURE
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TITLE
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CODE REVISER USE ONLY

CODE REVISOR'S OFFICE
STATE OF WASHINGTON
FILED

MAY 18 2005

TIME 9:30 AM
WSR 05-11-100

Supreme Court, U.S.
FILED
MAY 23 2007
OFFICE OF THE CLERK

NOS. 06-730, 06-713

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE GRANGE,

Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY, ET AL.,

Respondents.

STATE OF WASHINGTON; ROB MCKENNA, ATTORNEY GENERAL; SAM REED, SECRETARY OF STATE,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX VOLUME III OF III

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition For Certiorari of the Washington State Grange, Docket No. 06-710:

Washington State Republican Party v. Washington,
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Washington State Republican Party v. Logan
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Washington State Republican Party v. Washington,
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Washington State Republican Party v. Logan
377 F. Supp. 2d 907 (W.D. Wash. 2005) 35a

Permanent Injunction (7-29-05)..... 93a

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(No. 05-35774) (Appeal of Washington State Grange)

(No. 05-35780) (Appeal of State of Washington)

(NOTE: The dockets for these two appeals are identical except where noted below)

August 4, 2005 Docketed Cause and Entered Appearances of Counsel

August 4, 2005 Civil Appeals Docketing Statement

August 5, 2005 Case rejected from Circuit Mediation Program

August 9, 2005 Appellant's Notice of Designation of Reporter's Transcript

August 11, 2005 Appellees' Response to Motion to Expedite Review (No. 05-35774 only)

August 11, 2005 Appellants' Notice of Designation of Reporter's Transcript (entire transcript ordered)

August 12, 2005 Appellee State Republican Party's Joinder of Opposition to Motion to Expedite Review (No. 05-35774 only)

August 17, 2005 Appellant Washington State Grange's Reply to Response Supporting Motion to Expedite Appeal (No. 05-35774 only)

August 17, 2005 Appellees' Response Opposing Motion to Expedite Review (No. 05-35774 only)

August 18, 2005 Appellants' Joint Reply Supporting Motion to Expedite Review

August 19, 2005 Order Granting in Part and Denying in Part Motion to Expedite Review

August 25, 2005 Appellee Democratic Central Committee's Motion to Extend Time to File Brief

August 31, 2005 Order Granting Democratic Central Committee's Motion to Extend Time

September 19, 2005 Appellant Washington State Grange Opening Brief filed (No. 05-35774)

September 19, 2005 Appellant State of Washington's Opening Brief filed (No. 05-37580)

October 18, 2005 Appellee Washington State Republican Party Brief filed (No. 05-37580)

October 19, 2005 Appellee Washington State Republican Party Brief filed (No. 05-37574)

October 19, 2005 Appellee Libertarian Party of Washington Brief filed

October 26, 2005 Appellee State Democratic Central Committee Brief filed

October 26, 2005 Amicus FairVote's Motion and Brief filed

October 31, 2005 Appellant Washington State Grange's Response Opposing FairVote's Motion for Amicus Status (No. 05-37574)

October 31, 2005 Appellant State of Washington's Response Opposing FairVote's Motion for Amicus Status

October 31, 2005 Appellee Washington State Republican Party's Response Opposing FairVote's Motion for Amicus Status

November 1, 2005 Appellee Washington State Democratic Committee's Joinder in Appellee Republican Party's Response Opposing FairVote's Motion for Amicus Status

November 7, 2005 FairVote's Reply to Responses

November 8, 2005 Order Consolidating Appeals of Washington State Grange and State of Washington, Granting Appellee Washington State Democratic Party's Motion for Extension of Time, and Referring FairVote's Motion to the Merits Panel

November 8, 2005 Appellee Washington State Democratic Committee's Brief

November 8, 2005 Appellant Washington State Grange's Reply Brief

November 8, 2005 Appellant State of Washington's Reply Brief

December 21, 2005 Argument Calendared for Feb. 6. 2006

January 10, 2006 FairVote's Additional Brief

February 6, 2006 Argued and Submitted to Dorothy W. NELSON, Pamela A. RYMER, and Raymond C. FISHER

August 22, 2006 Order Granting Leave to FairVote to File Amicus Brief

August 22, 2006 Order on Merits Affirming U. S. District Court

September 13, 2006 Mandate Issued and Costs Taxed

October 3, 2006 Agreed Order on Attorneys' Fees

November 27, 2006 Notice from Supreme Court: Washington State Grange Petition for Certiorari Filed on 11/20/06

December 1, 2006 Notice from Supreme Court: State of Washington Petition for Certiorari Filed on 11/20/06

March 1, 2007 Notice from Supreme Court: Petitions for Certiorari Granted on 2/26/07

UNITED DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

(No. 2:05-cv-00927-TSZ)

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Initiative 872 and Primary Elections [Doc. #1]

May 19, 2005 Motion to Intervene by Intervenor Plaintiffs Washington State Democratic Central Committee [Doc. #2]

May 19, 2005 Motion to Intervene by Intervenor Plaintiffs Libertarian Party of Washington State [Doc. #3]

May 26, 2005 Motion for Preliminary Injunction by Plaintiff Washington State Republican Party [Doc. #7]

May 26, 2005 Declaration of John J. White, Jr. re Motion for Preliminary Injunction [Doc. #8]

May 27, 2005 Minute Order by Judge Thomas S. Zilly scheduling status conference [Doc #11]

June 2, 2005 Motion to Intervene of State of Washington, Rob McKenna, and Sam Reed [Doc. #22]

June 2, 2005 Answer of State of Washington Intervenor Defendants [Doc. #23]

June 7, 2005 Complaint of Intervenor Plaintiff Libertarian Party of Washington State [Doc. #28]

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June 7, 2005 Minute Entry re: Status Conference held on 6/7/05; Granting Motions to Intervene by State of Washington, Democratic Central Committee, Libertarian Party, and Washington State Grange; Adopting Briefing Schedule; Requesting Joint Statement of Issues; Continuing Motion for Preliminary Injunction [Doc. #45]

June 8, 2005 Order Granting Motion to Intervene of Libertarian Party [Doc. #27]

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July 1, 2005 Declaration of James K. Pharris re Response of State of Washington [Doc. #66]

July 1, 2005 Stipulation and Agreed Order of Substitution and Dismissal [Doc. #67]

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July 1, 2005 Exhibits A-V to Declaration by Washington State Grange in Response to Motions for Summary Judgment [Doc. #69]

July 1, 2005 Response by Intervenor Defendant Washington State Grange to Motions for Summary Judgment [Doc. #70]

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July 6, 2005 Declaration of Richard Winger filed by Libertarian Party of Washington [Doc. #79]

July 6, 2005 Reply of Plaintiff Washington State Republican Party [Doc. #81]

July 6, 2005 Supplemental Declaration of Kevin B. Hansen filed by Washington State Republican Party [Doc. #82]

July 8, 2005 Answer of Intervenor Defendant State of Washington to Complaint of Libertarian Party of Washington State [Doc. #83]

July 8, 2005 Answer of Intervenor Defendant State of Washington to Complaint of Washington State Democratic Central Committee [Doc. #84]

July 13, 2005 Minute Entry: Oral Argument Held; Court signs stipulation and agree order of substitution and dismissal; hears argument and takes matter under advisement [Doc. #85]

July 13, 2005 Stipulation and Order of Substitution and Dismissal [Doc. #86]

July 15, 2005 Order and Preliminary Injunction by Judge Thomas S. Zilly [Doc. #87]

July 22, 2005 Praecipe to Attach Proposed Order Granting Permanent Injunction [Doc. #88]

July 27, 2005 Objections by State of Washington re Praecipe to Attach Proposed Order [Doc. #90]

July 27, 2005 Objections by Washington State Grange re Praecipe to Attach Proposed Order [Doc. #91]

July 28, 2005 Minute Order by Judge Thomas S. Zilly re Plaintiffs' request to respond to Defendants' Objections [Doc. #92]

July 29, 2005 Response of Washington State Republican Party [Doc. #93]

July 29, 2005 Permanent Injunction by Judge Thomas S. Zilly [Doc. #94]

July 29, 2005 Notice of Appeal of Washington State Grange [Doc. #95]

July 29, 2005 Civil Appeals Docketing Statement by Washington State Grange [Doc. #96]

July 29, 2005 Notice of Appeal of State of Washington [Doc. #97]

July 29, 2005 Civil Appeals Docketing Statement by State of Washington [Doc. #98]

August 1, 2005 Transcript of Proceedings filed for 7/13/05 Hearing [Doc. #101]

August 3, 2005 Appeal Notification Packet sent to US Court of Appeals re Washington State Grange Appeal [Doc. #99]

August 4, 2005 Appeal Notification Packet sent to US Court of Appeals re State of Washington Appeal [Doc. #100]

August 5, 2005 (Proposed) Time Schedule Order filed by Washington State Grange [Doc. #101]

August 5, 2005 (Proposed) Time Schedule Order filed by State of Washington [Doc. #102]

August 8, 2005 Notice by Washington State Grange Ordering Entire Transcript [Doc. #104]

August 8, 2005 Letter by John J. White Requesting Status Conference {Doc. #105]

August 10, 2005 Motion for Attorney Fees by Libertarian Party [Doc. #106]

August 12, 2005 Order by Judge Thomas S. Zilly [Doc. #107]

August 22, 2005 Order by US Court of Appeals re Briefing Schedule [Doc. #108]

September 2, 2005 Order by US Court of Appeals Amending Briefing Schedule [Doc. #109]

January 4, 2006 Clerk's Record on Appeal transmitted to US Court of Appeals

April 27, 2006 Agreed Motion to Substitute Parties filed by Washington State Republican Party [Doc. #110]

May 4, 2006 Order Granting Motion to Substitute Parties [Doc. #111]

September 18, 2006 Mandate of US Court of Appeals filed [Doc. #112]

September 18, 2006 Costs Taxed Against State of Washington [Doc. #113]

October 6, 2006 Order of USCA Amending Mandate to Reflect Amended Attorney Fees [Doc. #114]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Intervenors LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Intervenors v. DEAL LOGAN, King County Records & Elections division Manager; et al., Defendants, STATE OF WASHINGTON, et al., Defendant Intervenors WASHINGTON STATE GRANGE, Defendant Intervenors.	No. CV05-0927A DECLARATION OF ROD DEMBOWSKI IN SUPPORT OF WASHINGTON STATE GRANGE'S CONSOLIDATED RESPONSE TO THE SUMMARY JUDGMENT/ INJUNCTION MOTIONS *["Grange Documents Dec."]* ***Noted for Oral Argument: 9:00a.m., Wednesday, July 13, 2005***

ROD DEMBOWSKI declares:

1. I am an attorney at Foster Pepper & Shefelman PLLC, and am one of the attorneys in this matter for the defendant intervenor Washington State Grange. As such, I have personal knowledge of

the facts stated in this declaration and am competent to testify about them.

2. Attached as the following Exhibits to this declaration are true and correct copies of the following documents:

Exhibit	*Description*
A	Washington State Republican Party Platform
B	Washington State Libertarian party Issue Summary
C	Washington State Democratic party Platform
D	Selected September 1996 Primary Election Results
E	Selected November 1996 General Election Results
F	Initiative 872 Listing From Washington Secretary of State
G	Declaration of Don Whiting
H	Washington State Initiative Petition Signature Totals
I	2004 Wash. Laws 271 (the "Montana" statute)
J	Election Results for Initiative 872 from Washington Secretary of State
K	Legislative Text of Initiative 872
L	John White Election Law CLE Material Excerpts
M	Secretary of State Emergency WAC Rules Implementing Initiative 872

N	King County Journal Article Regarding King County GOP Convention
O	Washington State Democratic Central Committee Rules for conventions
P	King County Official Call to Nominating Convention
Q	West King County Libertarian party Bylaws
R	Washington State Democratic Central Committee Membership Form
S	Washington State Libertarian Party Membership Form
T	NARAL-Pro Choice Washington Legislator Guide
U	Washington State House of Representatives Republican Caucus Membership Directory
V	Washington State Senate Democratic Caucus Membership Directory

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 1st day of July 2005.

Rod Dembowski

Rod Dembowski

EXHIBIT A

[Republican Party web page header omitted]

WASHINGTON STATE REPUBLICAN PARTY

Chris Vance, Chairman

2004 WASHINGTON STATE REPUBLICAN PARTY PLATFORM

Adopted by the delegates to the 2004 Washington State Republican Convention

Bellevue, WA – May 29, 2004

Platform Committee Chair: Olga Miller
Platform Vice-Chair: Betty Hanes

[internal internet links omitted]

"In all that the people can individually do as well for themselves, government ought not to interfere."

Abraham Lincoln

PREAMBLE

Republicans believe that good government is based on the individual and family, that each person's ability, dignity, freedom and responsibility must be honored and recognized. Our basic freedom, the value that makes our country unique in the world is rooted in Free Enterprise and the basic right to Private Property. The role of Government is to preserve and defend our ability to live in a free and peaceful society.

We reaffirm the words of our founding fathers as written in the Declaration of Independence: "WE hold these Truths to be self evident, that all Men are created equal, that they are endowed by the Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness –

That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed."

Our Republic was founded as one nation under God on principles clearly set forth in the Declaration of Independence and codified in our Constitution.

PLATFORM

Our Republican vision for Washington State is as follows:

ECONOMIC OPPORTUNITY – Jobs, Growth and Prosperity

Government must practice fiscal responsibility, while individual citizens should enjoy an atmosphere of free enterprise, unfettered by burdensome government regulation. Excessive taxation is a loss of personal freedom. Allowing people to keep more of what they earn allows opportunity and wealth created in the private sector to give hope and relief to those ill-served by government, and gives families and communities the resources to confront wider social problems.

Economic opportunity should include:

- Reducing taxes and fees on businesses and individuals.
- Reducing excessive regulation on businesses in Washington State.
- Examining government regulations to ensure they reflect the intent of the law.
- Enhancing international trade.

- Establishing and maintaining secure, broad based, energy resources within our nation's borders.
- Making the Bush tax cuts permanent.

Labor Unions

We recognize the historical importance of labor unions, and their protection of workers' health and general welfare. Union members should be given flexibility in regards to the political use of their Union dues and informed of their rights with respect to those dues.

NATIONAL DEFENSE/WINNING THE WAR ON TERROR – Superior military strength is vital to our national security

"We will rally the world to this cause by our efforts, by our courage. We will not tire, we will not falter, and we will not fail."
George W. Bush

We believe in a strong and free America, a nation leading the world in the expansion of peace, freedom and human rights. We commend our courageous President, and our armed forces, for all they have done to make us safer since September 11, 2001.

National defense should include:

- Supporting President Bush's doctrine of pre-emptive self defense.
- Preventing the subjugation of the national sovereignty of the U.S. to any foreign or international body.

- Ensuring that US military personnel remain only under U.S. command.
- Continuing the development of the Strategic Defense Initiative.
- Continuing to honor all past and current obligations to our troops and veterans.
- Gaining control of our borders and adopting a firm immigration policy for homeland security.
- Supporting the historical doctrine of pre-emption in US conflicts.

In Defense of Israel . . .

Israel, as a sovereign state, has the right to self-defense against foreign enemies and state sponsored terrorism. The Bush Doctrine clearly includes supporting Israel, which is being targeted by terrorists. For a peaceful, democratic Palestinian state to exist, we must support Israel in winning their war against terror in their homeland.

TRANSPORTATION

Recognizing that resolving the highway congestion is a major economic issue in the State of Washington, we call upon the governor and legislators to solve this as a priority issue.

The Department of Transportation should focus on highways, ferries, county roads, and city streets and minimize need for further increases. This focus will concentrate the efforts of such a refocused "Highway Department" to such a degree as to minimize the need for further tax increases. Conducting a thorough review of how we administer our transportation system will provide greater

economic opportunities for business and value to consumers.

We support:

- Prioritizing highway projects and using public money efficiently to reduce congestion and maintain infrastructure.
- Placing the Department of Transportation in the Governor's Cabinet.
- Subjecting the Department of Transportation and Sound Transit to thorough and continuous independent financial and performance audits.
- No sales tax being levied on materials and labor used on publicly funded transportation projects.
- The gas tax being used only to expand and maintain the state highway system.
- The creation of regional transportation improvement districts for each region's voter approved projects.
- Funding for Sound Transit only by those who live in the Sound Transit district.

ENERGY – Republicans believe in the reduction of our dependence on foreign energy and:

- Support President Bush's Energy Bill to reduce the nation's dependence on foreign crude oil.
- Support drilling for oil on the ANWR reserve.

- Support incentives for the use of renewable fuels.
- Support the development of alternative energy sources.
- Support reducing regulations and costs that may hinder re-licensing of many of our State's dams.
- Support resumption of safe nuclear power plant construction.
- Oppose removal of dams used for hydroelectric, irrigation, and transportation.

RESPONSIBLE STEWARDSHIP – Recognizing the primacy of people and the importance of our Northwest way of life

"We share this common goal: we must foster economic growth in ways that protect our environment. We must encourage growth that will provide a better life for citizens, while protecting the land, the water, and the air that sustains life."
George W. Bush

We can achieve a healthful environment and continued economic growth and prosperity when government works with property owners in a positive cooperative fashion. Property owners implementing environmental practices that are supported by sound, peer-reviewed scientific method are a model of responsible natural resource stewardship:

- Reasonably limit environmental regulations to insure that legislative intent is followed.

- Private timber owners deserve a set of responsible, reliable, and consistent government rules under which to operate.
- Growth management and shoreline rules are best determined at the local level.
- Save our dams by funding improvements in fish passage, improvements in spawning habitat, and ocean survival.
- Support the *Washington State Republican Party Contract with Rural Washington* [October 2003].

HOPE FOR RURAL AND AGRICULTURAL COMMUNITIES – Regulatory and Tax Relief – Living the American Dream

Washington's economy and the health of many of our rural communities is based on farming, fishing, mining, and the timber industry. Natural resource industries are the economic foundation of our economy. By ensuring economic opportunity for America's farmers and family farms of all sizes we will secure our domestic food supply and strengthen the rural economy.

To make our products competitive in the free market and make our farms viable and sustainable, we must:

- Establish a strong and secure domestic food supply that is not dependant on foreign products.
- Competitively price our agricultural products.
- Improve efficiencies in our ports and on our transportation routes.

- Create tax policies that recognize fluctuations in farm income and assist farmers in surviving low-income years.
- Require imported food to meet all U.S. standards.
- Require country of origin labeling for the benefit of American consumers.
- Protect individual (including corporate) water rights and value using water resources in food production.
- Support completion of the Columbia Basin Project.

FAMILY - Families, the cornerstone of free society

The traditional family unit is the cornerstone of our society and it is the primary responsibility of parents to guide and discipline their children. We understand that a primary responsibility of government is to uphold and respect traditional institutions, such as marriage between a man and a woman and family, which are its foundation. Our commitment to protecting the life of innocents from conception through the infirmities of age must be nurtured in both our culture and our laws.

We support:

- The parental right and responsibility to direct the upbringing of their children, and to provide care, discipline and moral training.
- The protection of innocent human life born or pre-born through natural death.

- Existing Washington State Law that defines marriage as a legal union between one man and one woman.
- An amendment to the United States Constitution defining marriage as the union between a man and a woman.

EDUCATION – The key to equal opportunity begins in the classroom

The primary authority and responsibility for educating children resides with parents.

The Federal Government, based on the both Amendment of the U. S. Constitution, may not determine expenditures and curriculum. School boards should be free to determine priorities, focusing on basic academics, teaching of the constitution and civics, history, opportunities for vocation and technical training, and the promotion of traditional American values.

We support:

- Providing the highest quality education through offering a broad selection of choices, whether public, private, charter or home school.
- Appropriate funding of public schools, and tax credits and vouchers for other choices.
- The right of parents to direct the education of their children.
- Education reform through full implementation of No Child Left Behind, giving parents more choices, stronger accountability of schools,

proven teaching methods and more local freedom.

- Teach English as our official and primary language, concentrated English instruction for non-English speaking students and regular instruction in English for all other subjects which will ensure successful job skills in a diverse, but overwhelmingly English speaking population.
- Sex education programs that promote abstinence before marriage.
- A policy that public schools not promote or identify homosexuality as a healthy, morally acceptable, or alternative lifestyle.
- Teaching the Declaration of Independence and the Constitutions of the United States and the State of Washington in our schools.
- Graduation requirements with an emphasis on rigorous academic skills in English, literacy, mathematics and sciences.

CRIME AND JUSTICE - Swift punishment for criminals

The primary role of government is to protect its citizens' freedoms and their property from both foreign and domestic crime. Crime threatens our ability as individuals to exercise our right of self-government, but we accept the risks inherent in a free society. The rule of law is protected by policies that punish, reduce and deter crime.

We support:

[Secretary of State web page header omitted]

WASHINGTON STATE 2004 GENERAL ELECTIONS

MEASURE RESULTS

Measure	Measures Name	Yes (Votes/Percentage)	No (Votes/Percentage)
Initiative Measure 872	Elections for partisan offices	**1,632,255** 59.84%	**1,095,190** 40.15%
Initiative Measure 884	Dedicating funds designated for education purposes	**1,102,996** 40.00%	**1,654,112** 59.99%
Initiative Measure 892	Authorizing additional electronic scratch ticket machines	**1,069,414** 38.45%	**1,711,785** 61.54%
Referendum Measure 55	Charter public schools	**1,112,964** 41.66%	**1,572,203** 58.33%
Initiative Measure 297	Mixed Radioactive and nonradioactive hazardous waste	**1,812,581** 69.09%	**810,795** 30.90%

Initiative Measure 872 – Elections for partisan offices

EXHIBIT J

Washingon Secretary of State

INITIATIVES: TOP 20 – HIGHEST PETITION SIGNATURES SUBMITTED

IP #282	1973	Elected Officials' Salaries	699,098
IP #695	1999	License Tab Fees/Tax Limitations	514,141
IP #602	1993	Spending & Revenue Limits/Tax Repeal	440,160
IP #790	2002	Law Enforcement & Fire Fighters Retirement Systems	345,543
IP #884	2004	Funds for Education Purposes	321,932
IP #330	2004	Claims from Healthcare Services	319,146
IP #872	2004	Elections for Partisan Offices	308,402
IP #729	2000	Charter Schools	306,361
IP #775	2001	Long-term In-home Health Care	304,327
IP #336	2004	Medical Malpractice	300,776
IP #518	1988	Minimum Wage	300,900
IP #732	2000	Teacher Salaries	298,722
IP #728	2000	School Class Sizes	297,199
IP #747	2001	Limiting Property Tax Increases	290,704
IP #593	1993	Mandatory Prison Sentences	290,613
IP #688	1998	Minimum Wage	288,357
IP #200	1997	Discrimination	280,511
IP #297	2003	Hazardous Waste	280,382
IP #559	1991	Property Tax Rollback	276,653
IP #773	2001	Low Income Health Programs	275,081

You can find this information at: http://www.secstate.wa.gov/elections/initiatives/statistics_petitions.aspx

EXHIBIT H

to vote for the candidate they believe is best qualified for public office in election's first stage (the September ballot), while changing the *result* of that September choice to be a straightforward winnowing of the field of all candidates down to the top two for the election's second stage (the November ballot).

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 1st day of July 2005.

Donald F. Whiting

Don Whiting

(1905-1917), the Grange worked on the efforts to adopt the initiative, referendum, recall, voter pamphlets, and the direct primary.

4. The Grange was instrumental in the creation of public utility districts (through Initiative to the Legislature No. 1), rural electrification efforts, protection of water resources (through Initiative to the Legislature No. 59), and efforts to provide universal telephone service. The Grange is now engaged in a technology program to provide public access computers and Internet access to under-served communities in our State.

5. From its inception, the Grange in Washington State has been concerned with government and the role of political parties in the public arena. In one of its commentaries on the proposed state Constitution, the Grange argued that the large number of elective offices would "foster machine politics of the most corrupt and offensive character." In 1922, the Grange helped overturn – by referendum – new legislation which would have required voter registration by party and closed primaries in our State.

6. In 1934, the Grange successfully sponsored Initiative to the Legislature No. 2 – usually referred to as the "blanket" primary – to give individual voters more say in the election of public officials. After the blanket primary was challenged in federal court the Grange filed Initiative to the People No. 872 to establish a replacement top-two election system in our State, a new system that restores the privacy of voters' personal political leanings when they vote in September and restores their free *choice*

1. I am special projects coordinator for the defendant intervenor Washington State Grange, and I have been actively involved with the Grange's activities, including its most recent activities on behalf of the enactment of Initiative 872. As such, I have personal knowledge of the facts stated in this declaration and am competent to testify about them.

1. The Washington State Grange is a fraternal, social, and civic organization chartered by the national Grange in 1889 and composed of around three hundred community and county Granges across our State, some but not all of which are organized under RCW 24.28.010. At the beginning of 2005, there were 20,720 fraternal members in 284 subordinate Granges and 41 county-level Granges and more than 25,000 non-fraternal members throughout the state.

2. The National Grange was born in the midst of the political and economic struggle against the monopoly power of the railroads and the grain storage warehouses during the westward expansion following the Civil War. These issues were also at the center of the formation of the Washington State Grange at the time of statehood. During the campaign for statehood in 1889, the Grange advocated that greater controls should have been placed on railroads than were included in the proposed state Constitution.

3. Over the years, the Washington State Grange has advanced and influenced the debate on many important public issues. In the early years of statehood, the Grange was a consistent advocate for women's suffrage. During the Progressive Era

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Intervenors LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Intervenors v. DEAN LOGAN, King County Records & Elections division Manager; et al., Defendants, STATE OF WASHINGTON, et al., Defendant Intervenors WASHINGTON STATE GRANGE, Defendant Intervenors.	No. CV05-0927Z DECLARATION OF DON WHITING IN SUPPORT OF WASHINGTON STATE GRANGE'S CONSOLIDATED RESPONSE *["Whiting Dec."]* ***Noted for Oral Argument: 9:00 a.m., Wednesday, July 13, 2005***

DON WHITING declares:

EXHIBIT G

Assigned Number: 872
Filed: 01/08/2004

Sponsor
Mr Terry Hunt
PO box 1186
Olympia, WA 98507-1186
360-943-9911
360-357-3548
grange@wa-grange.org

Ballot title
Initiative Measure No. 872 concerns elections for partisan offices.

This measure would allow voters to select among all candidates in a primary. Ballots would indicate candidates' party preference. The two candidates receiving most votes advance to the general election, regardless of party.

Ballot Measure Summary
This measure proposes a new system for conducting primaries for partisan offices. The[*] proposal continues current practice of permitting voters to vote for any candidate for office in primary and general elections, without limitation based on party. The two "to[*] candidates with the most votes in the primary advance to the general election. Candidates continue to designate their party. It becomes effective only if the court decision invalidating the traditional blanket primary becomes final.

EXHIBIT F

Commissioner of Public Lands			
Candidate	Party	Votes	Percentage
Jennifer Belcher	D	1098548	52.15%
Bruce Mackey	R	940154	44 63%
Marc Strauch	NP	68011	3.23%

Superintendent of Public Instruction			
Candidate	Party	Votes	Percentage
Teresa "Terry" Bergeson	NP	1260885	63.36%
Ron Taber	NP	729080	36.64%

Insurance Commissioner			
Candidate	Party	Votes	Percentage
Deborah Senn	D	1163832	55.36
Anthony "Tony" Lowe	R	872280	41.49%
Steve Sevick	NLP	66348	3.16%

NOVEMBER 1996 GENERAL

Governor Candidate	Party	Votes	Percentage
Gary Locke	D	1296492	57.96%
Ellen Craswell	R	940538	42.04%

Lt. Governor Candidate	Party	Votes	Percentage
Brad Owen	D	1022878	48.02%
Ann Anderson	R	989661	46.46%
Shawn Newman	EF	78510	3.69%
Art Rathjen	LBP	39277	1.84%

Secretary of State Candidate	Party	Votes	Percentage
Ralph Munro	R	1223769	57.30%
Phyllis Kenney	D	838632	39.27%
Gary Gill	NLP	73229	3.43%

State Treasurer Candidate	Party	Votes	Percentage
Mike Murphy	D	1155498	55.15%
Lucy DeYoung	R	939578	44.85%

State Auditor Candidate	Party	Votes	Percentage
Brian Sonntag	D	1338577	64.17%
Robert B. Keene, Jr.	R	747378	35.83%

Attorney General Candidate	Party	Votes	Percentage
Christine Gregoire	D	1280955	60.04%
Richard Pope	R	756639	35.46%
Richard Shepard	LBP	58672	2.75%
Luanne Coachman	NLP	37320	1.75%

Marc Strauch	NLP	25527	2.40%

Superintendent of Public Instruction			
Candidate	Party	Votes	Percentage
Teresa "Terry" Bergeson	NP	379544	38.31%
Ron Taber	NP	174990	17.66%
Chris Vance	NP	119644	12.08%
Dan Leahy	NP	68994	6.96%
Nancy Hidden-Dobson	D	53969	5.45%
Richard A. Fuller	NP	47438	4.79%
Gloria Guzman Johannessen	NP	43737	4.41%
Raul de la Rosa	NP	37646	3.80%
O. Jerome Brown	NP	32127	3.24%
Mae Laverne Lovern	NP	18018	1.82%
Earl LaBerge	NP	14540	1.47%

Insurance Commissioner			
Candidate	Party	Votes	Percentage
Deborah Senn	D	571167	54.00%
Anthony "Tony" Lowe	R	173610	16.41%
Brian McCullock	R	124514	11.77%
Dave Walker	R	77571	7.33%
Steve Skipper	R	63490	6.00%
Garland Dale Connor	R	23769	2.25%
Steve Sevick	NLP	23554	2.23%

Shawn Newman	REF	10774	1.01%
Michael Hackett	NLP	8945	0.84%

Secretary of State Candidate	Party	Votes	Percentage
Ralph Munro	R	643628	60.40%
Phyllis Kenney	D	388405	36.45%
Gary Gill	NLP	33571	3.15%

State Treasurer Candidate	Party	Votes	Percentage
Mike Murphy	D	382262	37.14%
Lucy DeYoung	R	288857	28.06%
Randolph Bell	R	201221	19.55%
Jack Kiley	D	156904	15.24%

State Auditor Candidate	Party	Votes	Percentage
Brian Sonntag	D	603663	56.81%
Robert B. Keene, Jr.	R	199721	18.79%
Nina Becker	R	192861	18.15%
Mike the Mover	R	66430	6.25%

Attorney General Candidate	Party	Votes	Percentage
Christine Gregoire	D	640031	57.32%
Richard Pope	R	415191	37.18%
Richard Shepard	LBP	37314	3.34%
Luanne Coachman	NLP	24031	2.15%

Commissioner of Public Lands Candidate	Party	Votes	Percentage
Jennifer Belcher	D	567009	53.36%
Bruce Mackey	R	291695	27.45%
Patrick Parrish	R	108877	10.25%
Randy Boss	R	69538	6.54%

SEPTEMBER 1996 PRIMARY

Governor Candidate	Party	Votes	Percentage
Gary Locke	D	287762	23.65%
Norman Rice	D	212888	17.50%
Ellen Craswell	R	185680	15.26%
Dale Foreman	R	162615	13.37%
Jay Inslee	D	118571	9.75%
Norm Maleng	R	109088	8.97%
Jim Waldo	R	63854	5.25%
Pam Roach	R	29533	2.43%
Nona Brazier	R	21237	1.75%
Brian Zetlen	D	6152	0.51%
Warren E. Hanson	R	4886	0.40%
Bob Tharp	R	4825	0.40%
Jeff Powers	SWP	3742	0.31%
Mohammad H. Said	D	3007	0.25%
Max Englerius	D	2837	0.23%

Lt. Governor Candidate	Party	Votes	Percentage
Brad Owen	D	242757	22.71%
Paull Shin	D	235461	22.02%
Ann Anderson	R	207727	19.43%
Jim West	R	96979	9.07%
Ed Torres	R	58803	5.50%
Gerald Clark Goodloe	R	50771	4.75%
Bob Owen	D	44510	4.16%
Bambi L. Litchman	D	34326	3.21%
Frank Gavaldon	D	32658	3.05%
Bruce Buckles	R	19951	1.87%
Harvey Billmaier	D	13613	1.26%
Art Rathjen	LBP	11902	1.11%

EXHIBIT D

guidelines or that are not being used for their original intent;

- tax credits given to those vehicles that exceed gas mileage guidelines or use alternative fuels;
- inclusion of ferry routes as major collector roads for planning and funding purposes;
- vigorously encourage revising safety standards for tires based on real world safety performance for new and retread passenger tires, medium and heavy vehicles;
- safer intersections for vehicles and pedestrians through better design, improved traffic control measures, and where warranted, revision of existing practices for traffic control devices to permit longer phasing to pedestrian signals to enable safer crossing at high-volume roadways;
- the use of alternative fuels, neighborhood electric and hybrid vehicles through targeted tax incentive;
- recognition that aviation, both private and commercial, is a key form of transportation in our state.

We oppose:

- tariffs paid solely by ferry riders that exceed the subsidies for operating other components of the state highway system;
- major airport expansion without public input, review and vote.

Passed by the convention, June 5, 2004

(4,589 words)

We oppose:

- using our precious military resources in international affairs as a first resort rather than a last resort, and we urge the abolishment of the pre-emptive war doctrine.

TRANSPORTATION

We believe that transportation systems (be they commercial, personal or mass transit) that are efficient, flexible and visionary are key to a healthy economy and environment.

We support:

- making investments in public infrastructure that broaden both rural and urban transportation choices and reduce dependence on the automobile;
- improved facilities for non-motorized movement of people such as pedestrian paths, bicyclists, and people in wheelchairs;
- provide equity and parity in state support among all forms of transportation (i.e. buses, ferries, light rail, heavy rail, monorail, etc.);
- public involvement at all levels in developing transportation plans and systems;
- multiple funding sources including fuel taxes, excise taxes and user fees, which are as progressive as possible, as appropriate for funding essential transportation projects;
- having multiple airports in major urban areas;
- elimination of all tax subsidies which benefit motor vehicles not meeting gas mileage

spouse reaches age 62, and elimination of the VA disability offset from military retired pay;

- restoration of full, no-cost treatment at military medical facilities for retirees, just as they were promised when they joined;
- complete funding of all VA hospitals and medical treatment facilities for disabled veterans and increased funding for long term care;
- compensation for Guard and Reserve members activated for more than 14 days in combat operations; the government should pay the difference between their non-military and military pay;
- increased instruction of all American personnel in their rights and responsibilities under the Geneva Convention;
- the rights of all persons serving in the military to serve free of sexual harassment and sexual assault and support the prosecution of offenders.

We affirm:

- the right and responsibility of each woman in the military to make her own reproductive decisions and her right to follow through on those decisions at non-military medical facilities and at her own expense. If needed, the Uniform Code of Military Justice should be revised to guarantee this right;
- that Veteran's programs be regarded as entitlement programs.

- review of mandatory sentencing guidelines and "three-strikes" sentencing, especially for non-violent offenses;
- drug courts;
- elimination of all forms of racial profiling by government or law enforcement;
- eliminating the conditions closely linked to crime and violence by investing in nonviolent conflict resolution, education, health care, social services, and living wage jobs;
- diversion for adult misdemeanors and juvenile offenders, when possible, to alternative victim-offender restorative mediation under the oversight of prosecuting attorney offices.

MILITARY

Democrats have always answered their country's call to duty and are proud of our military contributions to the nation. We believe that our military men and women – the best our nation has to offer – should always have leadership worthy of them.

We Support:

- all our military members serving at home and overseas, and a safe speedy return for those in combat areas;
- abolition of the military's "don't ask, don't tell" policy and legislation to ensure homosexuals serving their country have equal status with all other service members;
- repeal of the Survivor's Benefit Plan (SBP) Social Security offset when a widowed military

- violence should not become an accepted fact in our communities;
- authorities and communities must work together, assume responsibility for safety and prevention of crime, and make neighborhoods livable;
- government must help alleviate the social conditions which contribute to crime;
- comprehensive crime prevention must include youth programs;
- property forfeiture should be permitted only after criminal conviction, not on arrest or by seizure;
- corporate officers and board members should be held responsible for the actions of their companies.

We support:

- a new approach to drug addiction focused on treatment and education as opposed to incarceration;
- the stringent enforcement and maintenance of current state and federal laws regulating the ownership of firearms, while respecting the rights of responsible gun owners;
- abolishing capital punishment;
- adequate state funding for indigent defendants in all criminal cases;
- DNA testing to free the innocent and convict the guilty in criminal prosecutions;

- efforts to eliminate restrictions on the working hours of teenagers;
- U.S. corporations going offshore in order to evade U.S. laws and taxes;
- the privatization or out-sourcing of public services;
- profiteering, misuse of private data and predatory lending by financial institutions;
- right-to-work laws;
- use of permanent replacement workers during strikes;
- supplanting public employees with low-wage, low benefit contract employees or prison labor;
- privatization of Social Security.

LAW & JUSTICE

We recognize that civil order is necessary to the survival of a free and democratic state. Civil order can occur only when Justice treats the least among us the same as the greatest in all legal matters. We also recognize that in the pursuit of civil order, we cannot abandon the legal principles upon which a free and democratic society relies. We affirm Liberty and Justice for everyone residing in the US according to the constitution and believe that criminal Justice and human rights are linked.

We believe:

- prevention of crime is as important as reaction to crime;

- protection of whistleblowers, (including Federal employees);
- responsible and responsive bidder language in all public-financed works that includes contractor responsibilities on fair wages, health insurance, retirement and training;
- the 15% set-asides for using state certified apprentices on public works projects.

- Social Security
  - a separate and dedicated Social Security Trust Fund;
  - maintenance of disabled and dependent survivor Social Security benefits.
- Support for Economically Disadvantaged
  - welfare reform that will reduce proverty, not just the welfare rolls;
  - funding childcare for citizens transitioning off welfare;
  - public assistance safeguarding the vulnerable poor who cannot reasonably provide for themselves;
  - increased affordable and low-income housing, with emphasis on home ownership;
  - unemployment and retraining benefits for workers laid off or locked out by their employers;

We oppose:

- tip-credit minimum wage;

- economic policies conducive to the growth of small business and a strong independent farm system;
- strict enforcement of all contracting laws, holding violators responsible for payment of all taxes and penalties.

- Worker Rights
  - the rights of workers to a safe and healthy workplace, free from harassment;
  - the rights of all workers to organize and use mediation, arbitration, and the right to strike without fear of reprisal or replacement;
  - a workers' bill of Rights that includes rights of assembly, association and free speech, due process, freedom from discrimination, and democracy within unions;
  - the right of new bargaining units to request mandatory arbitration on the first contract;
  - the repeal of the anti-labor Taft-Hartley Act, which has tilted labor law in favor of employers;
  - the automatic recognition of a union, based on signatures of a majority of those represented (card-check);
  - full funding for enforcement of employment standards, child labor laws, and worker safety laws;

We support:

- Fair Taxation
  - progressive tax system at both the federal and state level
  - incentives, including targeted tax credits, to businesses that provide family wage jobs with adequate healthcare and pension benefits, and special programs such as on-site daycare;
  - fair system of paying for growth with impact fees; we oppose the cost-shifting of these expenses onto the general public.
- Fair Pay
  - minimum wage that is a living wage;
  - equal pay for equal work;
  - maintenance of state and federal prevailing wage laws;
  - reducing the wage gap between rural and urban areas of the state, including ensuring adequate housing wages and health care for farm workers;
  - protection of overtime pay.
- Fair Economic and Trade Policies
  - only multilateral trade agreements which are conditioned on environmental standards, human rights and workers rights, and which support democratic transparent processes;

treatment programs, and education designated to reduce these ills.

IMMIGRATION

We Support:

- challenging any legislation that:
  - declares English as the official language of the United States;
  - disregards cultural pluralism;
  - deprives those in need of education, social services, and employment access to these resources.

We Oppose:

- any immigration policy that denies civil and/or human rights or educational opportunities for immigrants and their children regardless of their immigration status.

We Affirm:

- that migrant workers deserve safe and adequate housing, medical care, education, and sanitary facilities.

INDIAN TRIBES AND TREATIES

Treaties made between sovereign Indian nations and the United States government must be upheld and preserved.

LABOR & ECONOMIC JUSTICE

Economic justice for working families is essential for the realization of a democratic society.

- the separation of church and state, and we oppose organized prayer in publicly funded schools;
- the right for medically assisted death with dignity with suitable safeguards for terminally ill patients;
- a woman's right to choose as protected by Roe vs. Wade and the Washington State Reproductive Freedom Act;
- the right to confidentiality of medical records and genetic information.

We affirm:

- the right to sovereignty over our own bodies. We support family planning and women's reproductive rights, regardless of age or ability to pay;
- that the state should not interfere with couples who choose to marry and share fully and equally in the rights, responsibilities, and commitment of civil marriage, regardless of sexual orientation or gender identity.

We oppose:

- discrimination in employment, housing, public accommodation, military service, insurance, licensing, or education based on race, religion, age, sex, marital status, sexual orientation, gender identity, disability, size, political affiliation, or national origin.

We abhor harassment, intimidation, and domestic or sexual violence, and support strong legislation,

- each person has a right to live free from fear of personal injury;
- the Patriot Act was created out of an irrational reaction to the terrorist acts of 2001, and therefore, the Act should be evaluated to remove components that are unconstitutional and affect liberty including, but not limited to:
  - free speech zones;
  - indefinite detention;
  - no fly list;
  - enemy combatants status;
  - denial of access to counsel;
  - suspension of the writ of habeas corpus.

  We insist that the Geneva Conventions be applied to all detainees, foreign or domestic, no matter where they are held.

We support:

- the Civil Rights Acts of 1964 and 1990;
- affirmative action; we believe those who suffer the burdens of discrimination must be afforded legal means and economic opportunities to overcome such injustice;
- the rights of senior citizens and individuals with disabilities to direct their own lives in housing, education and all other life choices, and the Americans with Disabilities Act of 1990;

records, prohibiting the sale or disclosure of personal medical or pharmaceutical records;

- protection of a woman's right to private consultation regarding reproductive decisions. Physicians will be allowed to perform reproductive procedures without fear of retaliation, even in the event of legislative changes;
- a reasonable medical malpractice rate structure, preserving a right to a jury trial and ensuring fair awards for preventable medical errors. Insurance company stockholders, rather than healthcare providers, will bear the burden of investment losses;
- the repeal of the Global Gag Rule that cuts $34M to UN and international family planning agencies;
- the legalization of marijuana for medical purposes;
- preservation of existing VA hospitals and clinics, and increased funding for the long-term care of veterans, we have a moral obligation to care for our veterans.

HUMAN RIGHTS AND CIVIL RIGHTS

We believe:

- that the inherent dignity and the equal and inalienable rights of all human beings are the foundations of freedom, justice, and peace in the world;
- food, shelter, medical care, education and jobs are basic human rights;

We support:

- creation of a universal, publicly funded, single-payer, not-for-profit, comprehensive health system preserving consumer choice;
- parity of mental and physical health coverage;
- amending the Medicare prescription drug benefit to permit access to generic and other cost effective drugs;
- eliminating discrimination against low income patients in the delivery of equal health care;
- a strong Patient Bill of Rights;
- improved long-term care of the consumer's choice (including home care and hospice), and ensuring living wages and training for caregivers;
- regulation and inspection of institutional and residential health care systems;
- Federal regulation and inspection of the medical insurance industry;
- increased funding for prevention programs (such as nutritional education, prenatal care, reproductive health education, and suicide prevention) and disease research and control (including stem cell research);
- dedicating tobacco settlement monies only to tobacco-related health care programs and tobacco use prevention;
- privacy protection of jointly-owned (patient/facility) medical and mental health

- fair, voter-verifiable, fully transparent and auditable voting systems;
- encourage colleges and universities to register students to vote and to open campus polling places;
- full congressional representation for residents of the District of Columbia;
- inclusive campaign and debate process that does not exclude credible third party candidates;
- enforcement of sunshine laws and transparency in sessions that discuss and make policy;
- aggressive congressional investigation of improper connections between government and industry;
- universal voter registration of all U.S. citizens who are eligible voters.

We oppose:

- any practice that reveals election results while the polling places are still open;
- privatizing, outsourcing or off-shoring of governmental public services.

HEALTHCARE

We believe access to quality health care is a basic human right for all people, essential to national safely and well-being.

- the United States' ratification of CEDAW (7th Convention to End Discrimination Against Women).

GOVERNMENT AND POLITICAL REFORM

Government embodies the people and must reflect our values as citizens. Our government must be fiscally sound, operate ethically, refrain from establishing or supporting religion, be open, transparent and accountable to the people. Our faith in our government and in our political system can only be restored through constructive reform.

Citizen participation is a right and duty of citizenship, and fee, open and verifiable elections are key to our democratic process. Only substantial election reform can restore faith in the lection system.

We believe:

- taxes are the price of civilization; we want our taxes to be levied fairly and spent frugally;
- all regulatory agencies should be fully funded.

We support:

- making Election Day a national holiday;
- immediate restoration of voting rights of felons who have completed their sentences;
- public financing of all election campaigns.
- laws requiring all broadcast license holders to provide adequate free airtime to political candidates as a condition of their FCC license;

financial obligations to the U.N, and ratifying pending human rights conventions;

- a call for all governments and corporations to immediately stop production, stockpiling, testing, and use of uranium, depleted uranium, or other radiological weapons;
- closing the School of the Americas, aka The Western Hemispheric Institute for Security Cooperation;
- practice fair trade based on sound environmental quality principles, worker rights, and welfare;
- creating a cabinet-level Department of Peace to establish non-violence as an organizing principle in both domestic and international affairs, strengthen international institutions and cooperative diplomacy to prevent acts of terrorism and resolve international conflicts;
- the elimination of excessive, unnecessary, and redundant programs and weapons, such as Star Wars and the Anti-Ballistic Missile Shield, from the military budget, and investing the savings in pressing domestic needs;
- that the United States should commit to vigorous, serious and persistent even-handed engagement towards a peaceful resolution of the Israeli/Palestinian conflict, promoting negotiations that lead to a viable resolution and ensure security and a good quality of life for the Israeli and Palestinian peoples;

- multinational corporations, their affiliates, subsidiaries and/or franchises may not operate above the international rule of law;
- WTO and NAFTA, as now written, undermined constitutional power of Federal and State government and fail to promote human rights, labor rights, environmental protection worldwide, and therefore the U.S. should re-negotiate said treaties or exercise its right to withdraw.

We support and affirm:

- developing and implementing an equitable and rapid exit strategy from Iraq and Afghanistan;
- nonviolent initiative aimed at rebuilding civil society and encouraging democracy in Iraq, Iran, and Afghanistan;
- encouraging strict health, safety, and environmental standards worldwide;
- the end of military support to countries that violate human and civil rights;
- honoring and upholding the rights, welfare, and healthy environment of all indigenous people;
- increasing federal funding to combat world hunger and the HIV/AIDS epidemic worldwide;
- consistently working cooperatively with all countries through the United Nations, upholding the Geneva Convention, paying its

- proclaim the executive and legislative branches of government shall abandon the doctrine of pre-emptive warfare and shall make nonviolence the primary organizing principle of foreign policy.

We support:

- International Criminal Court;
- U. N. Land Mine Treaty;
- Biological & Chemical Warfare Conventions;
- ABM Treaty;
- Comprehensive Test Ban Treaty;
- Nuclear Non-Proliferation Treaty;
- Space Preservation Treaty;
- Child Soldier Treaty;
- U.S. foreign policy must empower and support the right of all people to self governance and self determination;
- CEDAW (7th Convention to End Discrimination Against Women);
- The Kyoto Protocol on Global Climate change.

We believe:

- multinational corporations are not legal persons entitled to equal protection under the 14th Amendment to the U.S. constitution;
- U.S. companies abroad must be prohibited from engaging in practices that would be prohibited at home;

renewable energy, including biodiesel and ethanol.

We oppose:

- trading of energy and pollution credits;
- tying funding of school construction to destroying old-growth forests or non-sustainable resource exploitation;
- any expansion of nuclear power until environmentally safe long-term waste storage can be guaranteed;
- waste disposal and oil exploration in any wildlife refuge, wilderness area, or other environmentally sensitive area;
- importing new nuclear waste to the Hanford Nuclear Reservation;
- exemption of military bases from environmental regulation.

FOREIGN POLICY

The U.S.A. should seek to uphold human welfare and the environment for all people worldwide.

To promote democratic ideals abroad, it is imperative that we:

- support nonviolent conflict resolution;
- support a multilateral approach to foreign policy;
- support the Universal Declaration of Human Rights;

effects of all potentially harmful chemicals and substances that they produce, store or release;

- higher Corporate Average Fuel Economy standards and extending their application to SUVs;
- current state law, which requires voter approval of large public energy projects before bonds are issued;
- strong public policy that restores full funding for the National Park Service and preserves wilderness, old-growth, road free areas, wildlife corridors, wetlands, and other environmentally sensitive areas;
- efforts to reduce waste and to promote the reuse and recycling of materials;
- making polluters pay for cleanup by reinstating the federal tax on toxic waste under the Superfund Program;
- strengthening the Growth Management Act, and supporting neighborhood and community planners in their efforts to protect our quality of life;
- upgrading our outdated electrical grids so that power can be distributed efficiently and reliably;
- revising the 1872 Mining Act to provide fair market compensation to the public and limiting exploration and extraction in environmentally sensitive public lands;
- utilizing biomass conversion to process American farm products and byproducts into

environment. No government should make any law, regulation, treaty or agreement infringing upon these rights.

We support:

- conservation and development of clean, efficient, renewable, and natural sources of power;
- elimination of tax breaks to nonrenewable-energy companies, except for pollution control equipment;
- strong measures that reduce greenhouse gases;
- federal government restoration and cleanup of all contaminated lands and water, public or private;
- long-term policies that give priority to the preservation of biodiversity, protection of ecosystems and watershed, and restoration of wild salmon and other endangered species;
- efforts to reduce the use of pesticides, herbicides, and other persistent toxic chemicals;
- increasing governmental support for organic farming and preservation of agricultural land;
- programs to reduce polluted urban and agricultural run-off into waterways and aquifers;
- full disclosure by companies and by the government of the health and environmental

and assuring that early childhood education is accessible to all;

- inclusion of Fine Arts education in the Basic Education Act of the State;
- providing facilities and programs that advance vocational and technology education; providing access to higher education, by all, through financial aid and work-study programs;
- using a simple majority to pass school levies and bonds;
- public education employees' rights to organize, engage in collective bargaining, and strike without fear of reprisal or replacement;
- age-appropriate, research-based health and values education concerning issues of sexuality and alcohol/drug abuse for K-12;
- methods of funding educational capital projects other than logging public land;
- restraints on aggressive military recruiting in public high schools and equal opportunity for dissenting opinions.

We oppose:

- Charter Schools;
- voucher payments to private schools
- the commercial exploitation of students in our schools (e.g. "junk food" and advertising).

ENVIRONMENT AND ENERGY

Every individual has a fundamental right to clean air, pure water, safe food and a healthy natural

EDUCATION

"It is the paramount duty of the state to make sample provisions for the education of all children"
The Washington State Constitution – 1889

We believe public schools bring together people of diverse experience, ability and background for the purpose of learning.

We support:

- a stable funding source for all basic, gifted, special education state and federal programs and mandates such as "No child left behind";
- reinstatement of I-728 that calls for reduction of class sizes;
- reinstatement of I-732, which allows cost-of-living increases for all public school employees;
- schools that are safe from violence, bullying, harassment and retribution;
- full inclusion of all students into the school environment regardless of race, ethnic origin, religion, sexual orientation, gender identity, economic status or disability;
- full-time counselors and school nurses in every school;
- state of the art school facilities that are adequately maintained and regularly certified as safe and healthy by public health authorities;
- fully funding Headstart and ECEAP (Early Childhood Education and Assisted Programs)

constitutional rights, including the First Amendment right to make political contributions in the corporate capacity;

- tax breaks to corporations and other corporate welfare, unless a verifiable public interest is served.

Media

We believe:

- the public owns the broadcast airwaves and the Internet, which should be managed to serve the public interest.

We support:

- using diversity of ownership as the centermost principle of broadcast licensing;
- strengthening media ownership regulations to avoid corporate domination of our airwaves;
- encouraging minority and community media ownership;
- ensuring that media license holders provide diverse programming;
- increased funding for public broadcasting including documentary films and non-commercial news programs;
- establishing a system for community-level, non-profit, and non-commercial radio and TV nationwide.

approaches aimed at obtaining resources for such development;

- the role of farmers as 'stewards of the land'.

We strongly advocate adequate governmental support for agricultural research and extension programs to develop, improve, and protect crops and livestock and research the requisite projects to improve quality, marketability, and safety of agricultural products.

CORPORATE POWER & MEDIA REFORM

Corporate Power

We believe:

- corporations are vital to our economy and standard of living;
- business friendly laws can be beneficial;
- corporations should not exert an undue influence on our body politic or use our Constitution in the courts to thwart our democratically enacted laws.

We support:

- revoking the charters of corporations that repeatedly violate our laws;
- a government created by, of, and for the people, not corporations.

We oppose:

- the Supreme Court precedent that corporations are people, and further oppose corporation rights as persons under our constitution and their associated

agriculture, availability of high quality food, and economic security of the nation;

- conservation and environmental programs and economic incentives that help conserve agricultural land and natural resources such as soil, water, forests, and wildlife habitat;
- international programs that reduce global warming;
- development of domestic and international marketing opportunities for crop and animal products and international trade agreements that assure fair marketing and employment practices;
- antitrust laws should be enforced and applied to agribusiness;
- management of ocean fisheries to prevent dangerous depletion;
- substantial land grant college funding of research in sustainable, non-toxic farming techniques;
- strong organic farming standards;
- clear labeling of food including nation of origin, genetically modified organism status, irradiation, and organic status;
- requiring inspection of all animals AT RISK OF THIS DISEASE entering the food chain for processing for spongiform encephalopathy.

We recognize:

- the need for new and sustainable development in rural areas and encourage various

We adopt this platform to ensure that voters and candidates for public office understand and support our goals.

AGRICULTURE

Agriculture is the number one industry in Washington.

We believe:

- that any decisions about breaching, removing, compromising, or encroaching on waterways should be based on sound, credible economic and scientific information;
- U.S. dollars earmarked for agriculture subsidies should go to sustainable family farms and not to agribusiness;
- The Columbia and Snake Rivers, including the dams that were primarily constructed under Democratic leadership, support the economic health of the Pacific Northwest.

We support:

- programs that provide an economic stimulus for survival, protection, and improvement of rural communities, including development of affordable high-speed access and rural transportation services;
- governmental programs, particularly those of the U.S. Department of Agricultural, that assure the survival of family farms;
- funding for agricultural commodity programs to assure long-term, economic viability of

Washington State Democratic Party
2004 Platform

As passed by the Washington State Democratic Convention

Tacoma, Washington, June 5, 2004

PREAMBLE

We hold that democratic principles are the foundation of a safe, stable, and prosperous future and that these principles must be woven into the fabric of our social, cultural, and economic lives. We declare our commitment to human rights, justice, and opportunity for all.

Our platform rests on the principles that there should be:

- security for all citizens;
- education, jobs and economic opportunity for all;
- accessible and affordable health care for all Americans
- a rebuilding of our reputation in the world as a cooperative and just country;
- a reversal of the erosion of civil liberties in our country;
- a recognition that diversity strengthens our nation;
- a recognition that we are responsible for our ethical, economic, environmental and education legacy.

EXHIBIT C

center to put freedom of choice and responsibility back into *your* hands.

On every issue, we ask: *In a free country, who decides?* Should you be free to make important choices about your life, your family, your money and your business, or should politicians decide for you?

In a free society, government's role is to protect us from the threat of assault, theft, civil injustice and foreign attack. And so, as long as your actions are peaceful, you should have the freedom to decide for yourself without government interference. Please, help us move public policy in the direction of *liberty.*

We invite you to get more information: visit www.LPorg or call toll free: 800-682-1776.

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Where do Libertarians fit in Left vs. Right politics?

Positions most often held by the Left:		*Positions most often held by Libertarians:*		*Positions most often held by the Right:*	
• Government Regulated Economy	• Personal Freedom			• Economic Freedom	• Government Regulated Morality
• Military Intervtion (Somalia, Haiti, Balkans)	• Non-Interventionist Foreign Policy			• Robust National Defense	• Military Adventurism ("Regime Change")
• Using Eminent Domain for Private Gain	• Tolerance of Others' Peaceful Choices			• Respect for Others' Property Rights	• War on Drugs
• Ban Guns	• Civil Liberties and Privacy			• Individual Right to Keep and Bear Arms	• USA Patriot Act
• Tax Funding of Government Charities	• Separation of Church and State			• Giving Generously to Help Those in Need	• Tax Funding of Faith-Based Chartities
• Special Rights for Minorities	• Equal Opportunity			• Advancement Based on Individual Abilities	• Corporate Welfatre

[picture omitted] Politicians on the left and right believe government should control large parts of your life. Libertarians are building a party in the sensible

EXHIBIT B

THE PLEDGE OF ALLEGIANCE

We strongly support and wish to promote and protect the continued use of the phrase "one nation under God" in our Pledge of Allegiance.

WASHINGTON STATE REPUBLICAN PARTY, PLATFORM COMMITTEE:

Olga Miller
Chair

Betty Haines
Co-Chair

Rudy Plager
Adams County

Nancy McCallister
Asotin County

Sherrey Hankins
Benton County

Bill Scott
Chelan County

Steve Marble
Clallam County

Ryan Hart
Clark County

Robert Yates
Columbia County

William Schumacher
Cowlitz County

Peter Himmel
Douglas County

Bret A. Roberts
Ferry County

Michael Massey
Grant County

Glenis Morrison
Grays Habor County

Andrew Valrosa
Island County

Kathleen Horner
Jefferson County

Julie Holbrook
King County

Mike Jones
Kitsap County

Steven Douglas
Kittitas County

Keith Silen
Klickitat County

Jason Chambers
Lewis County

Jayne Deife
Lincoln County

Ardean Anvik
Mason County

Teri Mitschelen
Okanogan County

Gordon Chaffee
Pacific County

Warren Nadeau
Pend Oreille County

Pattie Winfrey
Pierce County

Jim Boone
San Juan County

Harry Ota
Skagit County

Geri Modrell
Snohomish County

Virgina Warren
Spokane County

Jerry Matteson
Stevens County

Linda Grubbs
Thurston County

Karry Chappel
Whatcom County

Jan Smith
Whitman County

Harold DeWitt
Yakima County

- Compensating property owners when government actions reduce the value of their land secures our right to own property.
- Parents' right to choose their children's schools, be it public, charter, private, or home, with tax credits or vouchers protects our right to equal opportunity.
- Protecting individuals' first amendment right of religious expression in our public schools does not conflict with the Establishment Clause.
- All people are entitled to be treated equally by government. The use of quotas or preferences to favor one person or group over another violates that principle, as well as the Civil Rights Act of 1964 and the laws of the State of Washington.

We believe the right to keep and bear arms as stated in the 2nd Amendment of the U.S. Constitution and Article I, Section 24 of the Washington State Constitution guarantees an individual right, and as such, we support Right to Carry laws. We support protection of the American firearms industry against frivolous and harassing lawsuits that blame them for the actions of criminals, and we call for increased enforcement of existing laws against criminals, not more laws aimed at law-abiding citizens.

We encourage personal responsibility in exercising these rights.

PERSONAL LIBERTY – A Bill of Rights for All Washingtonians

We have a moral obligation, a minimum debt owed, as free American, to defend and preserve our freedoms: Free Speech, Freedom of Assembly, Defense of Life, the Right to Vote, Private Property Rights, Parental Rights, the Right to Keep and Bear Arms, and protect competitive free enterprise. Government exists by the consent of the governed. Smaller and more effective government will restore civic responsibility and individual freedom.

Ours is a nation created not by force, but by unifying ideals. People came here to be free to worship God as they choose without State restriction. For ours to remain one nation, where the source of our rights derive from God, not the state, we have the duty and obligation to teach our children the profound meaning behind the simple statement of allegiance to our flag and the ideals our nation was founded upon and to which so many have sacrificed their lives.

We re-affirm the Proper Role of Government is to protect our inalienable rights, including:

- Proof of United States citizenship for voting eligibility protects our right to vote.
- Protecting the integrity of the vote of our overseas military personnel.
- Campaign finance law that in no way prohibits free expression.
- The initiative process provided for by the Washington State Constitution.

- Personal/private tax-exempt medical savings accounts.
- Increasing competition among health care providers to promote accountability to patients.
- The reduction of regulation in order to reduce the cost of health care and prescription drugs.
- All prescription drugs purchases and health insurance premiums being fully tax-deductible.
- Research of adult and placenta stem cells and oppose human cloning.
- Making malpractice liability reform an urgent priority, which will lower the cost of healthcare for all of us.
- Requiring parental consent for minors who seek medical procedures, treatments, or pharmaceuticals.
- Calling upon the Federal and State Legislators and the Governor to immediately work toward national parity in the way that Medicare reimbursements are made to healthcare providers.
- The belief that government regulations and funding will not improve the quality or affordability of health care; therefore, oppose a universal government-run health care system.

- Constitutional protections, which safeguard our individual liberty, due process, and equal protection under the law.
- The efforts of law enforcement officers and firefighters who serve and protect our communities.
- Zero tolerance for sexual exploitation of minors.
- The role of the judiciary is to uphold the law in a manner faithful to the constitution and the Bill of Rights, in accordance with legislative intent and established domestic legal precedent as the only legitimate standard.
- The right of individuals to provide for the defense of themselves, their families, and their communities within the bounds of Common Law and the U.S. Constitution.
- The death penalty where appropriate and oppose early release of convicted felons for budgetary reasons.
- Legislation requiring limitation on the number of appeals and period of time with bonds posted by the appealing party.

HEALTH CARE - Access and affordability for all

Health care is a personal issue, and individuals can make better decisions about their own care than government. Republicans believe in free market solutions that reduce health care costs by offering more and better choices for consumers.

We support:

[graphic of Washington state omitted]

County Results List

County	Yes (Voters/Percentage)	No (Voters/Percentage)
Adams	**3,365**	**1,504**
	69.11%	30.88%
Asotin	**5,385**	**2,993**
	64.27%	35.72%
Benton	**39,745**	**24,233**
	62.12%	37.87%
Chelan	**18,339**	**9,946**
	64.83%	35.16%
Clallam	**21,344**	**13,495**
	61.26%	38.73%
Clark	**93,703**	**63,618**
	59.56%	40.43%
Columbia	**1,410**	**631**
	69.08%	30.91%
Cowlitz	**27,533**	**13,044**
	67.86%	32.13%
Douglas	**8,355**	**4,460**
	65.19%	34.80%

Ferry	**2,150**	**1,084**
	66.48%	33.51%
Franklin	**10,413**	**5,271**
	66.39%	33.60%
Garfield	**760**	**482**
	61.19%	38.80%
Grant	**16,235**	**8,581**
	65.42%	34.57%
Grays Harbor	**19,501**	**7,570**
	72.03%	27.96%
Island	**21,533**	**15,002**
	58.93%	41.06%
Jefferson	**10,273**	**7,667**
	57.26%	42.73%
King	**467,015**	**383,913**
	54.88%	45.11%
Kitsap	**68,267**	**46,779**
	59.33%	40.66%
Kittitas	**9,813**	**5,649**
	63.46%	36.53%
Klickitat	**5,068**	**3,754**
	57.44%	42.55%
Lewis	**19,654**	**11,131**
	63.84%	36.15%

Lincoln	**3,545**	**1,913**
	64.95%	35.04%
Mason	**16,002**	**8,360**
	65.68%	34.31%
Okanogan	**9,795**	**5,689**
	63.25%	36.74%
Pacific	**6,549**	**3,322**
	66.34%	33.65%
Pend Oreille	**3,958**	**1,997**
	66.46%	33.53%
Pierce	**185,586**	**112,852**
	62.18%	37.81%
San Juan	**5,082**	**4,554**
	52.73%	47.26%
Skagit	**29,953**	**20,418**
	59.46%	40.53%
Skamania	**2,960**	**1,906**
	60.83%	39.16%
Snohomish	**171,974**	**111,603**
	60.64%	39.35%
Spokane	**126,174**	**70,630**
	64.11%	35.88%
Stevens	**12,331**	**7,011**
	63.75%	36.24%

Thurston	**65,193**	**42,155**
	60.73%	39.26%
Wahkiakum	**1,525**	**592**
	72.03%	27.96%
Walla Walla	**14,133**	**7,650**
	64.88%	35.11%
Whatcom	**50,171**	**33,913**
	59.66%	40.33%
Whitman	**9,849**	**7,168**
	57.87%	42.12%
Yakima	**47,564**	**22,650**
	67.74%	32.35%
Total	**1,632,225**	**1,095,190**
	59.84%	40.15%

Results last updated on: 12/23/2004 3:52:00 PM

EXHIBIT L

ELECTION LAW IN WASHINGTON

[picture omitted]

Learn how to defend the principles and procedures underlying the democratic process.

TUESDAY, JUNE 21, 2005

Sponsored By:
The Northewst Legal Foundation
818 South Yakima Avenue, Suite 200
Tacoma, WA 98504

Approved for 6.0 CLE Credits for Washington Attorneys: 5. General CLE Credits and .75 Ethics Credit

ELECTION LAW IN WASHINGTON

Learn how to defend the principles and procedures underlying the democratic process.

SCHEDULE

8:00 a.m. – Check In • Walk-In Registration • Distribution Of Course Books • Coffee, Tea, Juice and Pastry Service

8:45 – 9:30	**INTRODUCTION TO ELECTION SYSTEMS** Professor Todd Donovan – *Professor in the Political Science Department at Western Washington University, published dozens of academic articles, including several on initiatives, and has co-authored several books. Tod's primary academic expertise is in the areas of direct democracy, election systems, and representation.*
9:30 – 10:15	ELECTION TECHNOLOGIES AND MECHANICS Ms. Pat McCarthy – *Elected Pierce County auditor 2003 to Present. Certified Elections/ Registration Administrator-Auburn University-August 2002 Legislative Co-Chair of Washington State Association of County Auditors*
10:15 – 10:30	Break
10:30 – 11:15	UPDATE ON HAVA AND OTHER FEDERAL ELECTION LAWS Mr. Nick Handy – *Current Director of Elections in the Office of Secretary of State. Appointed in May 2004, Mr. Handy served as Elections Director through the 2004 general election. Mr. Handy is an attorney with thirty years experience working in state and local government, including fourteen years in the Washington State Attorney General's Office where he served as Deputy Attorney General.*

11:15 – 12:00	UPDATE ON WASHINGTON STATE ELECTION LAWS Ms. Katie Blinn – *Assistant Director of Elections for the Office of the Secretary of State and oversees the Secretary of State's Certification and Training Program. Prior to coming to the Secretary of State's office, Katie worked for four years as nonpartisan staff counsel at the Washington State House of Representatives and the Pierce County Prosecutor's Office.*
12:00 – 1:15	Lunch On Your Own
1:15 – 2:00	ELECTION ETHICS Professor John Strait – *Associate Professor of Law, Seattle University School of Law – graduate of Yale Law School; has taught, researched and written in the field of professional responsibility and legal malpractice since 1976.*
2:00 – 2:45	POLITICAL PARTIES: THEIR LEGAL ROLE IN ELECTIONS Mr. John White – *Principal at the Kirkland law firm, Livengood, Fitzgerald & Alskog, PLLC. He is outside general counsel to the Washington State Republican Party, and has represented individuals and organizations in connection with election and campaign finance law since the early 1990s. His practice focuses primarily on business, tax and estate planning matters.*
2:45 – 3:00	Break
3:00 – 3:45	ELECTION CONTESTS AND RECALLS Mr. David McDonald – *Senior litigation partner at Preston Gates & Ellis in Seattle, WA. Since 1992, he has represented the State of Washington at the Democratic national Committee. Since January 7, 2005, he has also served as the Contest Manager for the Washington State Democratic Party.*

3:45 – 4:30	PANEL DISCUSSION – RESTORING VOTER CONFIDENCE IN PUBLIC ELECTIONS or "ARE ELECTIONS TOO IMPORTANT TO LEAVE TO ELECTIONS OFFICIALS?" Prof. Todd Donovan • Mr. Nick Handy • Mr. David McDonald • Mr. John White Other panelists may participate.
4:30 pm	Complete Evaluation Forms - Adjorn

[1]

Political Parties: Their Legal Role in Elections

By Richard Derham and John White[1]

I Political Parties and Representative Democracy

> Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. [2]

Modern style political parties are, like the nation itself, largely the creation of the men who framed our constitution. As the Supreme Court statement quoted above notes, political parties organized around ideas and philosophy are essential to representative government.

It was not always so. James Madison's warning about the dangers of faction[3] grew out of the 16th and 17th Century English experience, replicated in some colonies, where narrow interests, frequently of the job-seeking variety, become the dominant factor

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[1] Mr. Derham is retired from Davis Wright Tremaine, where he practiced for 30 years. He served as legal counsel, Washington State Republican Party, 1976-1983.1992-1996, and as Chairman, King County Republican Central Committee, 1991-92.

Mr. White is a principal with the Kirkland firm Livengood, Fitzgerald & Alskog, PLLC. The has served as general counsel to the Washington state Republican Party since 1997, and as counsel to the King County Republican Central Committee (1991-1996). His practice includes representing individuals and

organizations on election and campaign finance law matters. The opinions expressed herein are personal and do not represent the views of anyone but the authors.

The authors express appreciation to Richard Shepard for his assistance in researching the law relating to third parties.

[2] California Democratic Party v Jones, 530 U. S. 567, 574 (2000).

[3] Federalist Papers, Number 10.

* * *

[24]

* * *

4. Implications for a "Top Two" System.

Voters in Washington State in 2004, by passing Initiative 872, enacted a enacted a two-stage election with a "winnowing" primary under which all candidates who file would appear on the ballot in the first stage and a run-off between the top two in the second stage.[105] A combination of apparently muddled drafting and indifference to the constitutional limitations of state regulation of partisan activities has left the fate of Initiative 872 in doubt. On May 19, the Washington State Republican party filed suit in the U.S. District Court seeking to have the act declared unconstitutional[106]. The Libertarian and Democratic Parties immediately filed to intervene in support of the Republican Party's claims.[107] A motion for preliminary injunction was lodged on May 26 for the court's June 10th motion calendar.

a. The positions of the Parties.

The Republican, Democratic and Libertarian Parties all contend that their constitutional rights either prevent the state from conducting a "top two" primary or allow their members to join together in any manner prescribed by their party rules to select their nominee. Each party has rules in place and is in the process of nominating candidates authorized to use its name in the 2005 partisan elections. While other candidates may file as independents, it is the parties' contention that each political party may determine which candidate may use the party designation on the ballot, and that any other result would allow a candidate to appropriate the party's name regardless of whether the party desires to associate with that candidate.

While Washington' Secretary of State has asserted that nothing in state election law interferes with a party's decision to have a "nominating convention," and to give financial support to a candidate of its choice, he asserts that the party has no right to control the use of its name on the ballot. The Supreme Court had previously rejected a similar argument:

> The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee.[108]

Indeed, as the long line of cases discussed above have demonstrated, a political party's right to control use of its name on the ballot is not only established, it is fundamental:

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[105] Ch. 2,Laws of 2005.

[106] Mr. White serves as counsel for plaintiff in this case.

[107] Washington State Republican Party v Logan, et al, Cause Number CV05-0927, U.S. District Court for the Western District of Washington.

[108] California Democratic Party v. Jones, 530 U. S. 567, 580 (2000).

EXHIBIT P

[The King County Democrat logo/header omitted]

OFFICIAL CALL
KCDCC—2005 Nominating Convention
Tuesday June 28, 2005—7:00 pm
Registration opens at 6:00 pm -- $10.00/person registration donation
Bellevue Community College gymnasium—3300 Landerholm Circle SE--Bellevue

Proposed Agenda

- Call to Order
- Flag Statute
- Welcome and Introductions
- Appointment of Secretary, Parliamentarian, Sergeant-At-Arms, Tally Committee, Timer
- Acceptance of Agenda
- Convention Rules Report
- Acceptance of Rules
- First Credential Report
- Nominations open for King County Executive (all eligible PCOs to vote)
- Five minutes of time for each candidate
- Second Credential Report
- Voting on King County Executive Candidates
- Tally and Results
- Five Minute Break

- Break into Nine King County Council Districts (badges to have Council District Number. Precinct, and Number of Delegate Votes printed along with Name)
    - King County Officers will convene the nine potential sessions
    - Appoint: Secretary, Parliamentarian, Sgt.-At-Arms, Timer, and Tally Committee
    - Rules Report
    - Credential Report
    - Nominations including five minutes of time for each candidate
    - Voting
    - Tally and Results
- Five Minute Break
- Return to General Session to report results of district voting
- Ballots and minutes will be returned to the Chair for safekeeping
- Good of the order
- Adjourn

MAKE YOUR VOICE HEARD!

Use your voice in the election of your Democratic party Candidate.

How will we elect the Democratic Party candidates in 2005?

The U.S. courts have ruled that the right of political parties to choose their nominees is protected by the U.S. Constitution. The Republican, Libertarian and Democratic Parties are challenging the top-two primary system that was passed by initiative in November as unconstitutional. If the courts do not agree that this top-two system is unconstitutional, the political parties have each set up rules to nominate their own candidates for partisan offices. (For complete rules of the 2005 Democratic Party nominating process visit www.kcdems.org or call 206-622-9157.

The County Democratic Party organizations will be holding nominating conventions in May and June to nominate their candidates for partisan offices that will appear on the September primary ballot. The elected and appointed Precinct Committee Officers (PCOs) will meet to elect their nominees for the Districts they live in. The candidate nominated will be placed on the primary ballot with the Democratic symbol beside their name. No other candidate will be able to run as the Democratic Party candidate.

This process will be in place for partisan offices only and will likely change in 2006 depending on action by the legislature or the courts.

How does my voice get heard in the nomination process?

The Democratic Party wants Democrats to get involved. We actually have a more open process than the Republicans. The Democratic Party will be using our Precinct Committee Officers, which are elected by their neighbors every even-numbered year. The Republicans will be using the caucus style system, which is highly Party-driven on the Republican side and limited in the number of people who are allowed to participate. You can get involved in the Democratic party nominating process two ways:

1) Become a Precinct Committee Officer. May 27, 2005, close of the business day, was the deadline for becoming an appointed PCO. All elected and appointed PCOs will have voice and voting rights at the convention.

2) If you did not want to become a PCO you may contact your neighborhood PCO and let them know what Democratic candidate you want to be nominated. This is the most direct form of citizen democracy there is. If your precinct does not have a PCO then contact the one closest to you. The PCOs that are elected and appointed will be seeking your input as well.

As the Democratic Party, we strive year-round to make sure that the rights of citizens to elect their representatives are protected at all levels. We know that this process will not appeal to some; however, we must continue to protect the first amendment

rights of the voters we represent. You can have a say and we want you to have a say!

Please contact your Democratic party officials if you have any questions – see page 5 of this publication.

page 2

Operating rules

for the King County Democratic Nominating Convention

Bellevue Community College Gymnasium—3300 Landerholm Circle SE—Bellevue

(see www.kcdems.org for directions and bus routes)

June 28, 2005—7:00 pm

(Adopted by the KCDCC Executive Board – May 24, 2005)

General

Only Democratic Precinct Officers elected on September 21, 2004, and those Precinct Committee Officers appointed by the King County Democratic Chair by May 27, 2005, may participate in any voting or nominating of candidates. Nominations shall not occur prior to 7:15 p.m.

Any challenges to a Precinct Committee Officer's eligibility to participate must be made in writing to the King County Democratic Chair no later than 6:00 p.m. on June 27, 2005. The Credentials Committee shall review and rule on all challenges.

During the counting of ballots by the tally committee, candidates in those races where ballots are being counted may appoint one observer. The candidate must notify the permanent chair of that particular meeting who their official observer is prior to the counting of the ballots by the tally committee.

In a position where only one candidate has been nominated, that position may be voted on by acclamation.

A PCO's vote shall be weighted, based on the 2000 Presidential results.

All ballots are public record and shall be in the possession of the King County Democratic Chair.

Proxy votes are not allowed.

No other business outside of the nominating of candidates shall take place at the nominating convention.

Any motion to modify or suspend these rules shall be out of order.

Executive

The Chair of the King County Democratic Party shall serve as permanent chair during the King County Executive nominating process. The Chair shall appoint a secretary, parliamentarian, sergeant-at-arms, credentials chair and committee, and tally committee chair and committee. The Chair shall take nominations from the floor. Each nomination requires a second. The nomination and seconding of a candidate shall not count against any time limit.

Candidates shall have up to five minutes to present their candidacy. This can include testimonials from other individuals. The order of presentations shall be in the order nominations were taken.

At conclusion of all presentations, up to ten minutes of questions shall be taken from the floor. All questions must be directed to all candidates. Candidates shall have up to one minute to respond to questions.

All eligible precinct committee officers must sign their ballots. Ballots must be cast for one candidate only and cannot be split.

Abstentions are in order, but shall not count towards the vote totals. Non-signed ballots shall be considered a spoiled ballot and not count toward the vote totals.

A simple majority of votes is needed. If a majority is not obtained by a candidate on the first ballot, the candidate with the least amount of votes shall be dropped, and voting shall take place again. This method will continue to take place until a candidate receives a majority of the vote. In the event that only two candidates remain and tie occurs, the tie shall be broken by lot by the remaining candidates.

Upon the nomination of the Executive, the Chair will direct the Precinct Committee Officers to convene by County Council District in which they were elected or appointed.

County Council

The Chair of the King County Democratic Party shall appoint a permanent Chair for each of the nine county Council nominating meetings. The permanent Chair of the County Council nominating meeting shall appoint a secretary, parliamentarian, and a tally chair and committee.

The permanent Chair shall take nominations from the floor. Each nomination requires a second. The nomination and seconding of a candidate shall not count against any time limit.

Candidates shall have up to five minutes to present their candidacy. This can include testimonials from other individuals. The order of presentations shall be in the order nominations were taken.

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Upon the nomination of the County Council position, the permanent Chair will immediately report to the King County Democratic Chair the results.

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[The King County Democrat logo/header omitted]

[advertising omitted]

King County Democratic Central Committee Officers

Elected Position	*First name*	*Last Name*	*e-mail* [omitted]
Chair	Susan	Sheary	
First Vice-Chair	Rob	Dolin	
Second Vice-Chair	Marle	Yamamoto	
Third Vice-Chair	Sharon	Mast	
Fourth Vice-Chair	Gurine	Nordby	
State Committeeman	Javier	Valdez	
State Committeewoman	Pat	Taylor	
Treasurer	Chuck	Laney	
Appointments accepted at re-organization 12/4/04			
Recording Secretary	Angela	Henry	
Leg Action Comm	Tina	Shamseldin	
Platform/By-laws	Joel	Ware	
Program Chair	Jean	Amos	
Sergeant-at-Arms	Juan	Martinez	
Parliamentarians/Attys	Paul	Schneiderman	
	Robert	Gaudent	
Independent Audit	Jenson	Hagen	

Candidate Recruitment	Judith Baker Hine
Endorsements	Linnea Peterson

Officers Named to Conduct King County Council District Sessions At 2005 Nominating Convention

The following KCDCC Officers will conduct the nine council nominating sessions at the King County Democrats Nominating Convention on Tuesday June 28, 2005, 7:00 pm.

District 1	Javier Valdez
District 2	Gurine Nordby
District 3	Pat Taylor

District 4	Rob Dolin	[picture omitted]
District 5	Chuck Laney	
District 6	Sharon Mast	
District 7	Susan Sheary	
District 8	Marie Yamamoto	
District 9	Angela Henry	

Javier Valdez will also lead the Credentials Committee, Alec Stephens will serve as Parliamentarian, Sgt-At-Arms, Angela Henry will serve as secretary, and Steven Smith will be in charge of the Tally Committee. Chair of the 36th District LD, Peter House will head the welcome committee.

Page 4

LEGISLATIVE DISTRICT INFORMATION

1st LD
Chair: Jeff Wiley, 425.778.4808
Meets 1st Thursday, 7:00 pm
Northshore Shool Admin
18335 Bothell Way NE, Bothell

5th LD
Chair: Kayne McGladrey,
425.894.5298
Meets 3rd Wednesday, 7:00 pm
Kinig County library Admin
960 Newport Way NW, Issaquah

11th LD
Chair: Edward Prince,
206.246.8747
Meets 3rd Tuesday, 7:00 pm
Carpenters Hall
231 Burnett North, Renton

30th LD
Chair: Larry Jackson,
253.661.2287
Meets 1st Wednesday, 7:00 pm
Federal Way Senior Center
4016 South 352nd St, Federal Way

31st LD
Chair: Tim Pearson
253.863.4543
Meets 4th Wednesday, 7:00 pm
Sumner Library
1116 Fryer Avenue, Sumner

32nd LD
Chair: Lila Smith, 206.818.1195
Meets: 2nd Wednesday, 7:00 pm
American Legion Hall
14521 17th AVE NE, Shoreline

36th LD
Chair: Peter House, 206784.7665
Meets 3rd Thursday, 7:30 pm
See website for locations

37th LD
Chair: Gwen Rench,
206.324.2786
Meets: 2nd Monday, 7:30 pm
Central Area Senior Center
500 30th Ave S., Seattle

41st LD
Chair: Barbara Geller,
206.232.4970
Meets 3rd Wednesday, 7:30 pm
UFCW Hall
12838 SE 40th, Factoria

43rd LD
Chair: Richard Kelley,
206.522.2735
Meets 3rd Tuesday, 7:30 pm
University Baptist Church
NE 47th and 12th Ave NE,
Seattle

45th LD
Chair. Ralph Corin,
425.556.5789
Meets 1st Wednesday, 7:00 pm
United Methodist Church
16540 NE 80th St, Redmond

46th LD
Chair: Scott White,
206.363.9522
Meets 3rd Thursday, 7:30 pm
Olympic View Elementary School
425 N 95th St, Seattle

33rd LD
Chair: Tara Jo Heinecke, 206.870.8819
Meets 3rd Monday, 7:00 pm
Normandy Park Congregational Church
19247 1st Ave S, Normandy Park

34th LD
Chair: Ivan Weiss, 206.463.4647
Meets 2nd Wednesday, 7:30 pm
The Hall at Fauntleroy
9131 California Ave SW, Seattle

47th LD
Chair: Bryan Kesterson, 253.639.3515
Meets 1st Wednesday, 7:00 pm
Machinists Hall
A St SW at 2nd St SW, Auburn

48th LD
Chair: Benjamin Von Ullrich, 206.979.9073
Meets 3rd Wednesday, 7:00 pm
Stevenson Elementary School Library
14220 NE 8th, Bellevue

KCDCC TREASURY
Cum-t-Date, May 31, 2005 (source: MS Money Manager)

INCOME	
Call for Membership/Incom	$11,197.70
District Donations	6,663.21
Elected Officials	6,850.00
Honors Banquet	13,029.00
Nominating Convention Sponsorship	610.00
Other Events	2,015.82
Refund (Old Postage Due Account and Rent Deposits)	852.59
TOTAL INCOME	$41,218.32
EXPENSE	
Advertising	$30.00
Bank Charges	484.85
Dell computer	996.89
C.N.A.—Liability Insurance	930.00
Membership Fees	100.00
Online / Internet Design and Services	1,400.00
Phone / FAX / Internet	844.03
Rent	2,664.00
Call for Membership	524.23
Consulting / Contract Work	7,450.00
Honors Banquet	8,739.53
Licenses and Fees	10.00
Maps / Research	6,850.00
Miscellaneous	40.00

Newsletter	813.43
Office Supplies	1,269.81
Other Events	4,872.81
Other Supplies	312.09
Postage—New Postage Due Account	100.00
Storage of File (paid through 7/12/2005)	100.00
Translation Service (Brochure in Spanish)	133.28
TOTAL EXPENSE	$38,664.95
BALANCE on 5/31/2005	$2,553.37

EXHIBIT Q

[Libertarian Party web page header omitted]

By Laws

Bylaws: Libertarian party of West King County
As amended on January 11, 2001

Article I: Identify and Purpose

A. The name of this organization is the Libertarian Party of West King County, hereinafter referred to as "the Party" – a regional affiliate of the Libertarian party of Washington State, hereinafter referred to as "the LPWS."

B. The LPWS Statement of Principles affirms the philosophy upon which the Libertarian party is founded: The purpose of the Party is to proclaim and implement the LPWS Statement of Principles by:

a. Nominating, endorsing and running candidates for office in the region, and

b. Entering into political information and educational activities.

c. Promoting local organizations, political and/or social, below the regional level.

The controlling document of the Party is these Party Bylaws. Authority for all matters not specifically addressed by the Party Bylaws will be Robert's Rules of Order.

Article II: Definitions

A. General Business Meetings. All attending Party Members may vote. General Business Meetings are required for interim election of officers, interim amendments to these Bylaws, or other purposes determined by the Chair.

B. Board Meetings. Open meetings for conducting Central Committee business. All attending party Officials may vote. May occur in conjunction with Supper Club events or separately, as called by the Chair.

C. Required Meeting Notices. For General business Meetings and Conventions: minimum 30 days prior notice via state and/or regional newsletter, email and web site announcements. For all other open meetings, including Board Meetings: 14 days prior notice via email and web site. Email is the equivalent of postal mail.

Article III: Membership

Voting membership in the regional Party consists of all current dues-paying LPWS members who reside within the geographic boundaries of this regional party.

Article IV: Central Committee

A. All powers of management and administration reside in the Central Committee. The Central Committee will include up to eight (8) voting members elected by the Party membership – four (4) party officers and four (4) Directors. Directors are also Committee Chairs for the defined responsibility.

B. The Central Committee will convene in open board meetings, at least four times per year. A quorum will consist of at least half the current number of elected Party Officials. General business Meetings are required for (a) interim election of Party Official (s); or (b) proposed amendment(s) to these Bylaws.

Article V: Party Officials

A. There will be four (4) Party officers: Regional Chair, Vice-Chair, Secretary, and Treasurer. If the position of Regional Chair becomes vacant, the line of succession will follow the order listed in this Section.

B. There will be up to four (4) Directors, accountable directly to the membership: Supper Club Director, Membership Director, Communications Director, and Campaigns Director.

C. Officials will be elected by a majority of Party members attending the Party convention. Officials will be elected individually, in the order designated in Section A of this Article. Terms of office will commence immediately upon adjournment, will run until the next annual convention. Only members of the state and regional Parties are eligible to serve as Officials. Officers and Directors may be removed by a 3/5 vote of the Central Committee.

D. The Central Committee may allocate expense budgets for the responsibility of, and the control by, individual Officers and Directors. Officers and Directors may not exceed their budgeted expenses without majority approval by the Central Committee.

E. The duties of each Officer and Director will be as follows:

- The Regional Chair will preside at all Party meetings, and act as CEO of the Party. The Chair may appoint non-officer positions such as Office Manager, Database Manager, Archives Manager, or non-voting Committee

Chairs for such functions as Fundraising, Convention Organizing, etc. If a Directorship is vacant, the Chair may appoint an interim Chair for the committee, however only elected Directors may vote on the Central Committee.

- The Vice Chair will preside at party meetings in the absence of the Regional Chair. The Vice-Chair will also be responsible for keeping abreast of, and fulfilling, current requirements to maintain certification by the State Party – as defined in the LPWS Constitution and Bylaws.
- The Secretary will record and maintain Minutes of party meetings and conventions, and be a signing officer for Party documents.
- The Treasurer will maintain the Party's bank accounts, deposit all revenues, and pay all bills. A formal Treasurer's Report will be presented at least once per calendar quarter.
- The Communications Director (Chair) is responsible for a Member Newsletter, Advertising, Public Relations and a regional Web Site – as and if the Central Committee authorizes and budgets each activity.
- The Campaigns Director (Chair) will recruit candidates and campaign teams for elected office, coordinate campaigns and volunteers where possible, and encourage members to seek appointed office.
- The Membership Director (Chair) will coordinate membership recruiting and retention with both the state and national

parties, and provide local Welcome/ Orientation to new members.

Article V: Supper Club Committee

A. The Supper Club Committee will consist of no more than three members, elected directly by members at any supper club meeting, responsible for monthly dinner/speaker meetings at the regional level. The Committee will elect its own Chair (Director). This Article may be amended only at a Supper Club meeting.

B. The Supper Club Mission is to conduct political outreach on issues affecting both economic and civil liberties, at primarily the state and local levels, both on-site and through print and broadcast media.

Article VI: Representative, State Central Committee

A. The regional Party will elect Regional Representative(s) to the State Central Committee, of sufficient number as permitted by LPWS Bylaws. All candidates who accept nomination to Regional Representative will be considered elected as either a Representative or an Alternate, based on the ranked order of votes received.

B. To assure full representation at meetings of the State Central Committee, the Chair may appoint temporary Regional Representatives or Alternates to vacant positions, for later approval by the membership.

Article VII: Annual Conventions

A. The Party will hold its Convention in January of each year, or by no later than June 30, for electing

Officers, Directors and Regional Representatives; amending bylaws; and nominating or endorsing candidates. A separate convention may be called, for nominations and/or endorsements.

B. Voting delegates will have been members of the Party for at least 60 days before the Convention date.

Article VIII. Amendments

These bylaws may be amended by a simple majority vote at Party conventions, or by a 3/5 majority at any general business meeting. The complete text of all proposed amendments must be provided, and/or made available by request, as part of the required 30-day prior notice.

EXHIBIT R

HELP US COUNT EVERY VOTE!

We need your help. With your contribution, you can help the Washington State Democrats fight for Democratic principles. We will use your contribution to (1) fight Rosse's attempts to undermine the electoral process, (2) reelect Maria Cantwell, (3) maintain the Democratic majority in state government, and (4) continue the overall momentum of Democrats in the state. Thank you!

Contact Information

Title: First Name: MI: Last Name:

Address 1:

Address 2:

City: State: Zip Code:

WA

Home Phone: Email:

( )

Employer: Occupation:

Membership Levels

I wish to donate to one of the following membership levels:

O $1000 Leadership Circle
O $520 Chairman's Club
O $365 Victory Club
O $240 Capitol Club
O $120 Cascade Club

Make a Contribution

If you would like to contribute an amount different from the membership levels, please type in the specified amount here. If you selected a membership level, this will be added to that amount.

O $60 Evergreen Club Amount:
O $36 Washington Club $

Payment Method

Please charge my donation to my Credit Card

O Visa O Mastercard

Credit Card Number: Security Code:

Expiration Date: Card Holder Name:

(mmyy) (e.g. John Q. Public)

Federal Election Law Requirements

☐ I confirm that the following statements are true and accurate:

- I am a United States citizen or a permanent resident alien.
- This contribution is not made from the general treasury funds of a corporation, labor organization or national bank.
- This contribution is not made from the treasury of an entity or person who is a federal contractor.
- The funds I am donating are not being provided to me by another person or entity for the purpose of making this contribution.
- I am at least 18 years old, or the funds I am donating are my own personal funds and I am donating these funds knowingly and voluntarily.

Federal Election law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose

contributions aggregate in excess of $200 in a calendar year. Your contribution will be used in connection with Federal elections and is subject to the limits and prohibitions of the Federal Election Campaign Act.

Your contribution is not tax-deductible as a charitable contribution for Federal Income tax purposes.

Submit Your Contribution [button] Reset [button]

(This will send your information to a secure processing page.)

NOTE:

While you are currently accessing this page over a regular Internet connection, when the page submits your information it will do so via a secure connection.

EXHIBIT S

Join the Libertarian Party Today!

To become a dues-paying member of the Washington state and national Libertarian Parties, fill in and return this form together with $25. You will also receive *LP News* and *Washington Libertarian*.

Name_____

Address_____

City_____State_____Zip_____

Phone (home)_____(work)_____

E-mail address_____

Employer_____Occupation_____

The Libertarian Party is the party of principle. To publicly affirm what we believe – and to ensure that our party never strays from our principles – we ask our members to proudly sign this statement:

I certify that I do not believe in or advocate the initiation of force as a means of achieving political or social goals.

_____

(signature required for membership only)

Please enclose a check or money order (no corporate checks please) for $25 payable to "Libertarian Party", or provide the following information to authorize billing to your credit card:

[ ] Visa [ ] MasterCard

Account #_____Exp. Date_____

Signature_____

(signature for credit card payment)

Send this form and payment to:

Libertarian Party
2600 Virginia Avenue NW
Washington, DC 20037

(Government Mandated Notices: The Federal Election Commission requires political committees to report the name, mailing address, and occupation and name of employer to each individual whose contributions aggregate in excess of $200 in a calendar year. The IRS requires us to print "contributions are not tax-deductible" on all fundraising appeals.)

LPWS Home Page

EXHIBIT T

[NARAL web page header omitted]

[extraneous information omitted]

[list appears twice in declaration; listed only once here]

1st District
Sen: Rosemary McAuliffe (D) PRO
Reps:Al O'Brien (D) MIXED +
Mark Ericks (D) PRO

2nd District
Sen: Marilyn Rasmussen (D) MIXED
Reps: Jim McCune (R) UNKNOWN
Tom Campbell (R) ANTI

3rd District
Sen: Lisa Brown (D) PRO
Reps: Alex Wood (D) PRO
Timm Ormsby (D) UNKNOWN

4th District
Sen: Bob McCaslin (R) ANTI
Reps: Larry Crouse (R) ANTI
Lynn Schindler (R) ANTI

5th District
Sen: Cheryl Pflug (R) ANTI
Reps: Jay Rodne (R) UNKNOWN
Glenn Anderson (R) MIXED +

6th District
Sen: Brad Benson (R) ANTI
Reps: John Serben (R) UNKNOWN
John Ahern (R) ANTI

7th District
Sen: Bob Morton (R) ANTI
Reps: Bob Sump (R) ANTI
Joel Kretz (R) UNKNOWN

8th District
Sen: Jerome Delvin (R) ANTI
Reps: Shirley Hankins (R) PRO
Larry Haler (R) UNKNOWN

9th District
Sen: Mark G. Schoesler (R) ANTI
Reps: Don Cox (R) ANTI
David Buri (R) UNKNOWN

10th District
Sen: Mary M. Haugen (D) PRO
Reps: Chris Strow (R) UKNOWN
Barbara Bailey (R) ANTI

11th District
Sen: Margarita Prentice (D) PRO
Reps: Zack Hudgins (D) PRO
Bob Hasegawa (D) PRO

12th District
Sen: Linda Evans Parlette (R) MIXED –
Reps: Cary Condotta (R) UNKNOWN
Mike Armstrong (R) UNKNOWN

13th District
Sen: Joyce Muliken (R) ANTI
Reps: Jan'ea Holmquist (R) UNKNOWN
Bill Hinkle (R) UNKNOWN

14th District
Sen: Alex Deccio (R) ANTI
Reps: Mary Skinner (R) MIXED +
James Clements (R) ANTI

15th District
Sen: Jim Honeyford (R) ANTI
Reps: Bruce Chandler (R) ANTI
Dan Newhouse (R) UNKNOWN

16th District
Sen: Mike Hewitt (R) UNKNOWN
Reps: Maureen Walsh (R) UNKNOWN
Bill Grant (D) PRO

17th District
Sen: Don Benton (R) ANTI
Reps: Jimm Dunn (R) UNKNOWN
Deb Wallace (D) PRO

18th District
Sen: Joseph Zarelli (R) ANTI
Reps: Richard Curtis (R) UNKNOWN
Ed Orcutt (R) UNKNOWN

19th District
Sen: Mark L. Doumit (D) ANTI
Reps: Dean Takko (D) UNKNOWN
Brian Blake (D) PRO

20th District
Sen: Dan Swecker (R) ANTI
Reps: Richard DeBolt (R) ANTI
Gary Alexander (R) MIXED +

21st District
Sen: Paull H. Shin (D) PRO
Reps: Mary Helen Roberts (D) PRO
Brian Sullivan (D) PRO

22nd District
Sen: Karen Fraser (D) PRO
Reps: Brendan Williams (D) PRO
Sam Hunt (D) PRO

23rd District
Sen: Phil Rockefeller (D) PRO
Reps: Sherry Appleton (D) PRO
Beverly Woods (R) ANTI

24th District
Sen: Jim Hargrove (D) ANTI
Reps: Jim Buck (R) ANTI
Lynn Kessler (D) PRO

25th District
Sen: Jim Kastama (D) MIXED +
Reps: Joyce McDonald (R) ANTI
Dawn Morrell (D) PRO

26th District
Sen: Bob Oke (R) ANTI
Reps: Patricia Lantz (D) PRO
Derek Kilmer (D) PRO

27th District
Sen: Debbie Regala (D) PRO
Reps: Dennis Flannigan (D) PRO
Jeanine Darneille (D) PRO

28th District
Sen: Mike Carrell (R) ANTI
Reps: Gigi Talcott (R) ANTI
Tami Green (D) PRO

29th District
Sen: Rosa Franklin (D) PRO
Reps: Steve Conway (D) PRO
Steve Kirby (D) PRO

30th District
Sen: Tracey J. Eide (D) PRO
Reps: Mark Miloscia (D) ANTI
Skip Priest (R) ANTI

31st District
Sen: Pam Roach (R) ANTI
Reps: Dan roach (R) ANTI
Jan Shabro (R) UNKNOWN

32nd District
Sen: Darlene Fairley (D) PRO
Reps: Maralyn Chase (D) PRO
Ruth Kagi (D) PRO

33rd District
Sen: Karen Keiser (D) PRO
Reps: Shay Schual-Berke (D) PRO
Dave Upthegrove (D) PRO

34th District
Sen: Erik Poulsen (D) PRO
Reps: Eileen Cody (D) PRO
Joe McDermott (D) PRO

35th District
Sen: Timothy Sheldon (D) MIXED
Reps: Kathy Haigh (D) PRO
Bill Eickmeyer (D) PRO

36th District
Sen: Jeanne Kohl-Welles (D) PRO
Reps: Helen Sommers (D) PRO
Mary Lou Dickerson (D) PRO

37th District
Sen: Adam Kline (D) PRO
Reps: Sharon Tomiko Santos (D) PRO
Eric Pettigrew (D) PRO

38th District
Sen: Jean Berkey (D) PRO
Reps: John McCoy (D) PRO
Mike Sells (D) PRO

39th District
Sen: Val Stevens (R) ANTI
Reps: Dan Kristiansen (R) ANTI
Kirk Pearson (R) ANTI

40th District
Sen: Harriet A. Spanel (D) PRO
Reps: Dave Quall (D) MIXED +
Jeff Morris (D) MIXED +

41st District
Sen: Brian Weinstein (D) PRO
Reps: Fred Jarrett (R) PRO
Judy Clibborn (D) PRO

42nd District
Sen: Dale Brandland (D) MIXED +
Reps: Doug Ericksen (R) ANTI
Kelli Linville (D) PRO

43rd District
Sen: Pat Thibaudeau (D) PRO
Reps: Edward B. Murray (D) PRO
Frank Chopp (D) PRO

44th District
Sen: Dave Schmidt (R) ANTI
Reps: Hans Dunshee (D) PRO
John Lovick (D) PRO

45th District
Sen: Bill Finkbeiner (R) MIXED
Reps: Toby Nixon (R) ANTI
Larry Springer (D) PRO

46th District
Sen: Ken Jacobsen (D) PRO
Reps: Jim McIntire (D) PRO
Phyllis Gutierrez Kenney (D) PRO

47th District
Sen: Stephen L. Johnson (R) ANTI
Rep: Geoff Simpson (D) PRO
Pat Sullivan (D) PRO

48th District
Sen: Luke Esser (R) ANTI
Reps: Ross Hunter (D) PRO
Rodney Tom (R) MIXED +

49th District
Sen: Craig Pridemore (D) PRO
Reps: Bill Fromhold (D) PRO
Jim Moeller (D) PRO

[NARAL web page header omitted]

[extraneous information omitted]

BILLS TO WATCH

OPPOSED BILLS	BILL NUMBER	STATUS
Establishing parental notification requirement for abortion (-) Companion Bill: HB 1433	SB 5821	Feb 8 First reading, referred to Health & Long-Term care
Prohibiting nonphysicians from performing abortions. (-) Finds that the medical risks to the health of women as a result of obtaining an abortion makes it necessary to clarify that only qualified health care prersonnel may perform abortions or assist in performing abortions.	HB 1774	Feb 4 First reading, referred to Health Care
Prohibiting partial birth abortions (-)	HB 1562	Jan 28 First reading, referred to Health care
Prohibiting public funding of abortion (-) Prevents all use of public funding for abortions except for extremely life-threatening situations. Companion Bill: HB 1776	SB 5852	Feb 10 First reading, referred to Health & Long-Term Care
Prohibiting the sale of fetal body parts. (-) Would prohibit fetal tissues from being sold, used, or donated in any way whatsoever (including medical research or procedures), and are **required** to be buried or cremated.	HB 1563	
Regarding health care provider right of conscience.	SB 5851	Feb 10 First reading, referred to Health & Long-Term Care.

(-)
Would allow doctors or health care personnel to claim a procedure or service to be "against their conscience", and thus be immune to any liabilities or punishments resulting from their refusal to perform it.

Additionally, it would be illegal for hospitals or clinics to discriminate between prospective employees based on the procedures or services they refuse to perform.

Companion Bill: HB 1654

Requiring a report of pregnancy termination be provided to birth mother and biological father and kept by department of health	SB 5836	Feb 9 First reading, referred to Health & Long-Term Care

(-)
Requires all hospitals and lawful abortion clinics to report all details of every abortion, every patient's history, every patient's personal information, etc. to the department of health.

Requires that copies are also sent to the biological mother of the patient, and biological father if possible.

Requiring notice of breast cancer risks related to abortion -SB	SB5820	Feb 8: First reading, referred to Health & Long-Term Care

(-)
Would make it unlawful to provide an abortion without informing the patient of any and all possible research which may arise linking abortion to breast cancer.

Effectively makes parental consent required for abortions for minors.

Makes it illegal for a person to perform an abortion unless they have enough insurance to cover any potential lawsuit due to "reproductive cancers".

SUPPORTED BILLS	BILL NUMBER	STATUS
Healthy Youth Act Senate Bill	SB 5306	Jan. 24: Public hearing in committee

(-)
Declares that the state has a duty to ensure that young people are equipped with the comprehensive, medically accurate, age-appropriate information that they need to protect themselves from unintended pregnancy and sexually transmitted diseases, including HIV infection. The best approach to protecting youth in this environment is to

support the resources that they trust and to ensure that young people ;have as much accurate, objective information about sexual health as possible.

The Companion Bill is HB 1282

Limiting the court's discretion concerning denial of dissolution decrees	HB 1171	Jan 18 First reading, referred to Juvenile Justice & Family Law.

(-)

Provides that, in considering a petition for dissolution, a court may not use the petitioner's pregnancy as a bsasis for denying the decree for dissolution, nor may the court continue the matter on that basis.

EXHIBIT U

[pictures have been omitted]

HOUSE OF REPRESENTATIVES

John Ahern	Spokane	District 6
Gary Alexander	Olympia	District 20
Glenn Anderson	Fall City	District 5
Mike Armstrong	Wenatchee	District 12
Barbara Bailey	Oak harbor	District 10
Jim Buck	Joyce	District 24
David Buri	Colfax	District 9
Bruce Chandler	Granger	District 15
Jim Clements	Selah	District 14
Cary Condotta	Wentachee	District 12
Don Cox	Colfax	District 9
Larry Crouse	Spokane	District 4
Richard Curtis	La Center	District 18
Richard DeBolt	Chehalis	District 20
Jim Dunn	Vancouver	District 17
Doug Ericksen	Ferndale	District 42
Larry Haler	Richland	District 8
Shirley Hankins	Richland	District 8
Bill Hinkle	Cle Elum	District 13
Janéa Holmquist	Moses Lake	District 13

Fred Jarrett	Mercer Island	District 41
Joel Kretz	Waucoada	District 7
Dan Kristiansen	Snohomish	District 39
Jim McCune	Graham	District 2
Joyce McDonald	Puyallup	District 25
Dan Newhouse	Sunnyside	District 15
Toby Nixon	Kirkland	District 45
Ed Orcutt	Kalama	District 18
Kirk Pearson	Monroe	District 39
Skip Priest	Federal Way	District 30
Dan Roach	Bonney Lake	District 31
Jay Rodne	Snoqualmie	District 5
Lynn Schindler	Spokane	District 4
John Serben	Spokane	District 6
Jan Shabro	Lake Tapps	District 31
Mary Skinner	Yakima	District 14
Chris Strow	Clinton	District 10
Bob Sump	Republic	District 7
Gigi Talcott	Tacoma	District 28
Rodney Tom	Bellevue	District 48
Maureen Walsh	Walla Walla	District 16
Beverly Woods	Kingston	District 23

EXHIBIT V

[pictures have been omitted]

SENATORS

Jean Berkey	Everett	District 38
Lisa Brown	Spokane	District 3
Mark Doumit	Cathlamet	District 19
Tracey Eide	Federal Way	District 30
Darlene Fairley	Lake Forest Park	District 32
Rosa Franklin	Tacoma	District 29
Karen Fraser	Thurston County	District 22
Jim Hargrove	Hoquiam	District 24
Mary Margaret Haugen	Camano Island	District 10
Ken Jacobsen	Seattle	District 46
Jim Kastama	Puyallup	District 25
Karen Keiser	Kent	District 33
Adam Kline	Seattle	District 37
Jeanne Kohl-Welles	Seattle	District 36
Rosemary McAuliffe	Seattle	District 1
Erik Poulsen	Seattle	District 34
Kargarita Prentice	Renton	District 11
Craig Pridemore	Vancouver	District 49
Marilyn Rasmussen	Eatonville	District 2
Debbie Regala	Tacoma	District 27
Phil Rockefeller	Kitsap County	District 23
Tim Sheldon	Potlatch	District 35

Paull Shin	Edmonds	District 21
Harriet Spanel	Bellingham	District 40
Pat Thibaudeau	Seattle	District 43
Brian Weinstein	Eastside Suburbs	District 41

THE HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Interveners, LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Interveners, v. DEAN LOGAN, et al., Defendants, STATE OF WASHINGTON, et al., Defendant Interveners, WASHINGTON STATE GRANGE, et al., Defendant Interveners.	Case No: CV05-0927-TSZ WASHINGTON STATE GRANGE'S CONSOLIDATED RESPONSE TO THE SUMMARY JUDGMENT / INJUNCTION MOTIONS OF (1) THE WASHINGTON STATE REPUBLICAN PARTY; (2) THE WASHINGTON DEMOCRATIC CENTRAL COMMITTEE; & (3) THE LIBERTARIAN PARTY OF WASHINGTON STATE *["Grange's Consolidated Response"]* ***Noted for Oral Argument: 9:00 a.m., Wednesday, July 13, 2005***

* * *

[27]

membership qualifications."[39] The Libertarian Party claims the Initiative "prevents the parties from settling their differences internally."[40] And the

Democratic Party claims the Initiative "forces the political parties to adulterate their candidate selection process with nonmembers of their party."[41]

The text of Initiative 872, however, does no such thing. For example:

- *Membership.* The Democratic and Republican Parties allow you to self-designate yourself as (and become) a member by signing a check – e.g., signing a $36 check buys you a "Washington Club" membership in the Democratic Party.[42] And the Libertarian Party allows you to self-designate yourself as (and become) a member by signing a sentence that says you're non-violent.[43] Initiative 872 does nothing to change the parties' internal rules governing ***their*** membership criteria.

- *Platform.* The Democratic Party and Republican Party have opposite positions on abortion.[44] Initiative 872 does nothing to change the parties' internal rules governing ***their*** positions on issues.

- *Adherence to Party Platform.* The political parties do not currently require their members to adhere to the parties' platform. For example, the Democratic Party and Republican Party both include in their caucuses of the Washington State Legislature members who espouse positions directly at odds with the party's position on the core value issue of abortion.[45] Initiative 872 does not prohibit the parties from changing their

internal rules to exclude from membership those persons who do not espouse or adhere to ***their*** core values.

- *Nominee.* The parties are free to select whatever person they want to be ***their*** "nominees" for public office, and limit the persons making the parties' selection . . .

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[39] Republican Party S.J. Motion at 8:18-19; see also Libertarian Party S.J. Motion at 8:5-6.

[40] Libertarian Party S.J. Motion at 8:18-19.

41 Democratic Party S.J. Motion at 17:9-11.

[42] Grange Documents Dec., Ex. R (WSDCC membership form).

[43] Grange Documents Dec., Ex. S (Libertarian membership form; the sentence says: "I certify that I do not believe in or advocate the initiation of force as a means of achieving political or social goals").

[44] Grange Documents Dec., Ex. C at "Human Rights & Civil Rights" section, unnumbered Platform p.8 (Washington State **Democratic** Party 2004 Platform); Grange Documents Dec., Ex. A at p.5 (2004 Washington State **Republican** Party Platform).

[45] For example, NARAL Pro-Choice Washington identifies **Republican** State Representative Shirley Hankins and Fred Jarrett as being "PRO" [for "Pro-choice"]. Grange Documents Dec. Ex. T at pp.2 & 5 (NARAL listings). Yet the Republican Party includes representatives Hankins and Jarrett as members of the Republican House Caucus. Grange Documents Dec. Ex. U at p.2 (House Republican Caucus Members directory). Similarly, NARAL Pro-Choice Washington identifies **Democratic** State Senators Mark L. Doumit and Jim Hargrove as "ANTI" [for "Anti-choice"]. Grange Documents Dec. Ex. T at p.3 (NARAL listings). Yet the Democratic Party includes senators Doumit and Hargrove as members of the

Democratic Senate Caucus. Grange Documents Dec. Ex. V at p.1 (Senate Democratic Caucus Members directory).

* * *

[32]

* * *

C. *Stipulated Issue 3*: "If the primary system under Initiative 872 nominates political party candidates for public office, does Initiative 872 violate the first amendment by compelling a political party to associate with unaffiliated voters and members of other political parties in the selection of its nominees?"

No.

The primary system established by Initiative 872 does not compel the ***political parties*** to do anything – never mind force them to include in their internal organization any "unaffiliated" voter or "member" of some other political party.

Instead, the top-two system established by Initiative 872 allows ***the candidate*** to disclose the political party which that candidate prefers. Unlike the "blanket" and "Montana" systems that required a political party to accept the candidate who prevailed in the September primary as being that party's nominee on the November ballot, the Initiative's top-two system does not require or force any ***political party*** to do anything.

For example, if the Republican Party wants to say it has nothing to do with and does not support former State Republican Chair and Congressional

leader Jennifer Dunn's son (Reagan Dunn) for King County Counsel, it can do so. But it cannot co-opt the power of the government to secure a prior restraint against Reagan Dunn's stating to voters that the party he "prefers" is the Republicans.

* * *

[36]

As the Republican Party's lead counsel in this case has candidly explained elsewhere, Initiative 872 "enacted a two-stage election with a 'winnowing' primary under which all candidates who file would appear on the ballot in the first stage, and a run-off between the top two in the second stage."[49] The Republican Party's June submissions do not establish any constitutional "right" to always be one of the top two candidates chosen by the voters in that new top two system.

G. *Plaintiffs' Supplemental Issue 6:* "Should Initiative 872 be invalidated in its entirety?"

No.

The Initiative's allowing a candidate to disclose the political party he "prefers" is at the heart of the political parties' complaints. And the Libertarian Party succinctly identifies the allegedly offending sections of Initiative 872:

> **Section 7(3)** of I-872 expressly provides for candidates to indicate a political party "preference" when filing a declaration of candidacy and will be shown on ballots "for the information of voters." **Section 11** expressly provides

> that the candidate's party "preference" will be included in the state voter's pamphlet.

Libertarian Party S.J. Motion at 7:17-20 (emphasis added).

As explained earlier, however, this "preference" disclosure part of Initiative 872 is not unconstitutional.

Moreover, even if that "preference" part were unconstitutional, that part could be invalidated without having to nullify the entire top-two system enacted into law by the voters – for as the plaintiff Republican Party's own motion acknowledges, "in ordinary circumstances only the specific part of an enactment that is unconstitutional will be invalidated."[50]

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[49] Documents Dec., Ex. L (*Political Parties: Their Legal Role in Elections* (June 21, 2005 Election Law CLE materials by Richard Derham and John White) at p. 24, first paragraph.

[50] Republican Party S.J. Motion at 26:20-21.

[37]

The severability of a State statute presents a question of State law.[51]

And Washington State law holds that if part of a statute is unconstitutional, "only the part of [the] enactment that is constitutionally infirm will be invalidated, leaving the rest intact." *Guard v. Jackson*, 333 P.2d 544, 548, 83 Wash.App. 325 (1996) (severing part of statute that violated due process rights and upholding the remainder of statute), aff'd,

132 Wash.2d 660, 940 P.2d 642 (1997); cf. the parallel federal law, e.g., *U.S. v. Booker*, 125 S.Ct. 738, 764, 160 L.Ed.2d 621 (2005) (courts "must refrain from invalidating more of the statute than is necessary. Indeed, [courts] must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute") (internal citations & quotation marks omitted).

Washington law further holds that "a severability clause is not necessary in order to meet the severability test." *In re Parentage of CAMA*, 109 P.3d 405, 414, 154 Wash.2d 52 (2005).

Washington law accordingly does not strike down a Washington statute in its entirety "unless ... it cannot reasonably be believed that the legislative body would have passed one [part] without the other, or unless the elimination of the invalid part would render the remaining part useless to accomplish the legislative purpose." *McGowan v. State*, 60 P.3d 67, 75, 148 Wash.2d 278 (2002) (severing unconstitutional part of Section 2(1)(d) in Initiative 732, but upholding the remaining parts of that Initiative).

Washington law further holds that the legislative declaration of intent in the statute at issue can save a statute with unconstitutional provisions from being struck down in its entirety – for if the *valid* parts of the statute can still fulfill a declared intent, then the statute is severable

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[51] *Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir. 2003) (finding portion of primary statute unconstitutional but remanding to district court to perform severance analysis according to Arizona State law standards).

[38]

and only the *in*valid parts will be stricken. *McGowan*, 60 P.3d at 76 (relying on Initiative's intent section to determine that unconstitutional portion of Initiative 732 could be severed).

Here, Sections 1 & 2 of Initiative 872 express the Initiative's intent. Those Sections declare an intent of the Initiative to allow each *voter* to chose from among all declared candidates in the primary to winnow the list of candidates on the November ballot down to two, while maintaining each *voter's* right to keep his or her personal politics absolutely secret.

Those purposes can be served even if this Court strikes down the allegedly unconstitutional part of the Initiative that allows *candidates* to disclose the political party (if any) they prefer. Thus, if this Court agrees with the plaintiffs' arguments that it is unconstitutional for Initiative 872 to allow a candidate to state that he or she "prefers" a particular political party without that party granting the candidate permission to make that statement, then Washington law requires this Court to invalidate only that "preference" part of the Initiative instead of striking down the People's enactment in its entirety.[52]

H. *The Republican Party's Preliminary Injunction Motion:* Do the Republican Party's submissions prove that this federal court should write a new law for the State of Washington's upcoming 2005 primary?

Departing from its core value of opposing judicial activism by the federal courts, the Republican Party demands that this federal Court invalidate the top-two election system established by Initiative 872, and then effectively re-enact the prior "Montana" system after severing out and invalidating the parts of that system that the Republican Party claims are equally unconstitutional.

Even if the political parties' June motions had established that Initiative 872 is facially unconstitutional, the plaintiffs still would not be entitled to the injunction they demand unless:

---

[52] Although the plaintiff Republican Party suggests that Washington voters are too unintelligent to want to vote for a constitutional Initiative (Republican Party S.J. Motion at 27:3-4 ("It cannot be believed that voters would have passed the initiative stripped of its ... unconstitutional provisions")), it provides no support for that ad hominem attack on the citizens of our State, and the Grange accordingly does not waste time or space with an argument in reply.

* * *

THE HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Interveners LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Interveners v. DEAN LOGAN, et al., Defendants, STATE OF WASHINGTON, et al., Defendant Interveners WASHINGTON STATE GRANGE, et al., Defendant Interveners	Case No: CV05-0927-TSZ DECLARATION OF RICHARD WINGER

I, RICHARD WINGER, declare on penalty of perjury under 28 U.S.C. 1746 as follows:

I am over the age of 18, not a party to this action and competent to make the following statements. My curriculum vitae is attached to this document as Exhibit A.

I have had an opportunity to examine Washington state's primary election returns for all congressional elections, and all state office elections, for the years 1992-2002, taking the data supplied on the website for the Washington Secretary of State. I calculated the percentage of the total vote received by each candidate who placed second.

The results for each election return are: 1992, the average second-place finisher polled 31.80%. 1994, 33.37%. 1996, 33.28%. 1998, 29.94%. 2000, 31.58%. 2002, 34.61%. The average of all these averages is 32.43%. The average second-place finisher in Washington state blanket primaries 1992-2002 polled 32.43%.

Excluding the obvious cases when only one major (Democratic or Republican) party candidate was running, I found that no one but a Republican or a Democrat ever placed first or second, with one exception. That single exception was in 2000 in the 38th state legislative district, for State House or Representatives, seat # 2. In a race with two Democratic candidates, one Reform candidate, and one Libertarian candidate, one Democrat (who had polled 63.75% in the primary) and the Reform candidate finished first and second, respectively.

DATED Tuesday, July 5, 2005, at San Francisco, California.

Richard Winger

RICHARD WINGER

Richard Winger
3201 Baker Street
San Francisco, California 94123

Curriculae Vitae, updated April 25, 2005

EDUCATION

BA, Political Science, University of California, Berkeley, 1966 Graduate study, Political Science, UCLA, 1966-67

EMPLOYMENT

Ballot Access News, Editor 1985-Present

Editor of newsletter covering legal, legislative and political developments of interest to minor parties and independent candidates. Researcher of ballot access laws of all 50 states from years 1888-present; well versed in how ballot access laws of each state work historically and how they compare to each other. Responsible for reading all statutes, regulations, legal opinions, and state attorney general opinions on rights of political parties and the publications of minor parties.

On the editorial Board of *Election Law Journal*, published by Mary Ann Liebert, Inc., Larchmont, N.Y., since 2001.

PUBLICATIONS

Wrote a chapter or two in each of these books:

Democracy's Moment

Edited by Ronald Hayduk and Kevin Mattson (2002: Rowman & Littlefield, Lanham, Md.)

The Encyclopedia of Third Parties in America

edited by Immanuel Ness and James Ciment (2000: M.E. Sharpe, Inc., Armonk, N.Y.)

Multiparty Politics in America

Edited by Paul S. Herrnson (1997: Rowman & Littlefield, Lanham, Md.)

The New Populist Reader

Edited by Karl Trautman (1997: Praeger, Westport, Ct.)

Additional articles published in these periodicals:

Wall Street Journal

American Review of Politics

The Long Term View

University of Mass. Law Review

California Journal

Election Law Journal

Cleveland State Law Review

Chronicles Magazine

Price Costco Connection

Fordham Urban Law Journal

NATIONAL INTERVIEWS on Minor Parties, Independents, Ballots and Ballot Access

NBC	National Public Radio
ABC	Pacifica Radio
CNN	MSNBC

CASES: TESTIMONY or AFFIDAVITS (political party or candidate prevailing)

Alaska: Libertarian Party v Coghill, state superior court, 3rd dist., 3AN-92-08181, 1992 Court issued injunction enjoining enforcement of petition deadline for minor parties

Arizona (2 cases): Campbell v Hull, 73 F Supp 2d 1081 (1999); Az. Libt. Party v Hull, superior court, Maricopa Co. 96-13996, 1996. Court ordered Secretary of State to place Libertarian Party presidential candidate on ballot.

Arkansas (2 cases): Citizens to Establish a Reform Party v Priest, 970 F Supp 690 (E.D. Ark. 1996); Green Party of Ark. v. Priest, 159 F.Supp.2d (E.D. Ark. 2001).

California: California Democratic Party v Jones, 530 US 567 (2000).

Colorado: Ptak v Meyer, 94-N-2250, U.S. Dist. Ct., 1994. Court ordered Secretary of State to place Libertarian legislative candidate on ballot.

Florida (2 cases): Libt. Party of Fla. v Mortham, 4:96cv258-RH, U.S. Dist. Ct., N.D., 1996. Court ordered Secretary of State to place Libertarian vice-presidential candidate on ballot. Reform Party v Black, 885 So.2d 303 (Fla. 2004).

Georgia: Bergland v Harris, 767 F 2d 1551 (11th cir., 1985). U.S. Court of Appeals remanded case back to U.S. District Court.

Before U.S. District Court acted, legislature substantially eased law, so case became moot.

Hawaii: Libt. Party of Hi. v Waihee, cv 86-439, U.S. Dist. Ct., 1986. Court ordered Lieutenant Governor to extend petition deadline for new parties.

Illinois: Nader v Ill. State Bd. of Elections, 00-cv-4401, U.S. Dist. Ct., N.D., 2000. Court ordered State Board of Elections to place candidate on ballot.

Iowa: Oviatt v Baxter, 4:92-10513, U.S. Dist. Ct., 1992. Court ordered Secretary of State to put Grassroots Party candidate for Congress on ballot.

Kansas: Merritt v Graves, 87-4264-R, U.S. Dist. Ct., 1988. State did not defend three election laws and signed consent decree on independent petition deadline, requirement that independent petitions not be circulated outside of circulator's home precinct, and requirement that voters could only register in qualified parties. This case should not be confused with another by the same name decided in December, 1988.

Kentucky: Libt. Pty. of Ky. v Ehrler, 776 F Supp 1200 (E.D. 1991)

Maryland (2 cases): Dixon v Md. State Adm. Bd. of Elec. Laws, 878 F 2d 776 (1989, 4th cir.); Green Party v Bd. of Elections, 832 A 2d 214 (Md. 2003).

Nevada (2 cases): Libt Pty. of Nev. v Swackhamer 638 F Supp 565 (1986); Fulani v

Lau, cv-N-92-535, U.S. Dist. Ct., 1992. Court ordered Secretary of State to put various minor parties on ballot.

New Jersey (2 cases): Council of alternative Political Parties v Hooks, 999 F Supp 607 (1998); Council of alternative Political Parties v State Div. of Elections, 781 A 2d 1041 (N.J.Super. A.D. 2001)

New York (3 cases): Molinari v Powers, 82 F Supp 57 (E.D.N.Y. 2000); Schulz w Williams, 44 F 3d 48 (2nd cir., 1994); Green Party of N.Y. v N.Y. State Bd. of Elections, 389 F.3d 411 (2nd cir., 2004).

North Carolina: Obie v N.C. Bd. of Elections, 762 F Supp 119 (E.D. 1991); DeLaney v Bartlett, decided July 26, 2004 (middle district, 1:02-cv-741).

Oklahoma: Atherton v Ward, 22 $_2$F Supp 2d 1265 (W.D. Ok. 1998); Beaver v Clingman, 363 F.3d 1048 (10th cir., 2004).

Pennsylvania: Patriot Party of Pa. v Mitchell, 826 F Supp 926 (E.D. 1993).

South Dakota: Nader v Hazeltine, 110 F Supp 2d 1201 (2000).

Texas: Pilcher v Rains, 853 F 2d 334 (5th cir., 1988).

Virginia: Libt. Pty of Va. v Quinn, 3:01-cv-468, U.S. Dist. Ct., E.D. (2001). Court ordered State Board of Elections to print "Libertarian" party label on ballot next to name of Libertarian candidates.

West Virginia (3 cases): State ex rel Browne v Hechler, 476 SE 2d 559 (Supreme Court 1996); Nader v Hechler, 112 F.Supp.2d 575 (S.D.W.V., 2000); McClure v Manchin, 301 F Supp 2d 564 (2003).

CASES: TESTIMONY or AFFIDAVITS (political party or candidate not prevailing)

Arizona: (2 cases) Indp. Amer. Party v Hull, civ 96-1240, U.S. Dist. Ct., 1996; Browne v Bayless, 46 P 3d 416 (2002).

Arkansas (2 cases): Langguth v McKuen, LR-C-92-466, U.S. Dist. Ct., E.d., 1992; Christian Populist Party v Sec. of State, 650 F Supp 1205 (E.D. 1987).

California: Socialist Workers Party v Eu, 591 F 2d 1252 (9th cir., 1978)

Florida (2 cases): Fulani v Smith, 92-4629, Leon Co. Circuit Court, 1992; Libertarian Party of Fla. v State of Fla., 710 F 2d 790 (11th cir., 1983).

Georgia (2 cases): Libertarian Party of Ga. v Cleland, 1:94-cv-1503-CC, U.S. Dist. Ct., N.D. (1994); Esco v Secretary of State, E-53493, Fulton Co. Superior Court, 1998.

Idaho: Nader v Cenarrusa, cv 00-503-, U.S. Dist. Ct. 2000.

Illinois: Libt Party v Rednour, 108 F 3d 768 (7th cir., 1997)

Kansas: Hagelin for President Committee v Graves, 804 F Supp 1377 (1992)

Maine (2 cases): Maine Green Party v Diamond, 95-318, U.S. Dist. Ct., 1995; Maine Green Party v Secretary of State, 96-cv-261, U.S. Dist. Ct., 1996

Maryland (2 cases): Ahmad v Raynor, R-88-869, U.S. Dist Ct., 1988; Creager v State Adm. Bd. of Election Laws, AW-96-2612, U.S. Dist. Ct., 1996.

Missouri: Manifold v Blunt, 863 F 2d 1368 (8th cir. 1988)

New Hampshire: Werme v Gov. of N.H., 84 F 3d 479 (1st cir., 1996).

North Carolina: Nader v Bartlett, 00-2040, 4th cir., 2000.

Ohio: Schrader v Blackwell, 241 F 2d 783 (6th cir., 2001)

Oklahoma (2 cases): Rainbow Coalition v Okla. State Elec. Bd., 844 F 2d 740 (1988); Nader v Ward, 00-1340, U.S. Dist. Ct., 1996

Oregon: Libt Party v Roberts, 737 P 2d 137 (Ore. Ct. of Appeals, 1987).

Texas (2 cases): Texas Indp. Party v Kirk, 84 F 3d 178 (5th cir., 1996); Nat. Comm. of U.S. Taxpayers Party v Garza, 924 F Supp 71 (W.D. 1996).

Virginia: Wood v Meadows, 207 F 3d 708 (4th cir., 2000)

West Virginia: Fishbeck v Hechler, 85 F 3d 162 (4th cir., 1996)

Wyoming: Spiegel v State of Wyoming, 96-cv-1028, U.S. Dist. Ct., 1996.

QUALIFIED EXPERT WITNESS

Fishbeck v Hechler, 85 F 3d 162 (4th cir. 1996, West Virginia case)

Council of Alternative Political Parties v Hooks, 999 F Supp 607 (1998, N.J.)

Citizens to Establish Reform Party v Priest, 970 F Supp 690 (E.D. Ark, 1996)

Atherton v Ward, 22 F Supp 2d 1265 (W.D.Ok. 1998)

Calif. Democratic Party v Jones, 530 US 567 (2000)

Swanson v Bennett, not decided yet, U.S. Dist. Ct., m.d.Ala. (02-T-644-N)

Beaver v Clingman, 363 F 3d 1048 (10th cir., 2004, Okla. Case)

Green Party v N.Y. State Bd. Elections, 267 F Supp 2d 342 (E.D.N.Y. 2003)

Lawrence v Blackwell, pending in 6th cir., U.S. Dist. s.d. Ohio (1:04-cv-398);

In all cases in which I was presented as an expert, the opposition accepted that designation, except in the Green Party of New York case. The U.S. District Court ruled that I qualify as an expert. See headnote #1 at page 342, and footnote nine on page 350.

SPEAKING ENGAGEMENTS: Colleges and Scholarly Meetings

Panel of New York City Bar Association, 1994. Ballot access.

Amer. Political Science Assn., nat. conventions of August 1995 and August 1996. Papers.

Capital University School, law school class, Columbus, Ohio, 1996. Guest lecturer.

Cal. State U., course in political science, Hayward, 1993 and 1996. Guest lecturer.

San Francisco City College, course in political science, 1996 and 1997. Guest lecturer.

Providence College, R.I., Oct. 1997, seminar on ballot access.

Harvard U., JFK School of Gov't, Oct. 18, 1995, guest lecturer, ballot access.

Voting Integrity Project national conference, Apr. 1, 2000, speaker on ballot access.

Center for Voting & Democracy nat. conference, Nov. 30, 2003,speaker on ballot access.

THE HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Interveners, LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Interveners, v. EAN LOGAN, et al., Defendants, STATE OF WASHINGTON, et al., Defendant Interveners, WASHINGTON STATE GRANGE, et al., Defendant Interveners.	Case No: CV05-0927-TSZ LIBERTARIAN PARTY REPLY TO THE STATE AND GRANGE RESPONSES TO THE LIBERTARIAN PARTY MOTION FOR SUMMARY JUDGMENT AND LIBERTARIAN PARTY RESPONSE TO THE STATE MOTION FOR SUMMARY JUDGMENT NOTED FOR HEARING ON: JULY 13, 2005, AT 9:00 AM.

PRELIMINARY MATTERS

First, the Libertarian Party ("the LP") does not "agree" with the State that this case is "ripe for adjudication" (CD 65, at 5). The LP expressed a preference at the June 7th status conference to conduct discovery before seeking disposition on the

merits, particularly if the defendants were going to allege the LP was not harmed by I-872. The LP filed its motion for summary judgment because the defendant County Auditors—for whom the Secretary of State has now substituted (CD 67)—demanded an accelerated disposition of the case and consequently this court's scheduling order called for *cross-motions* for summary judgment to be filed on June 17th. To the extent this case has been accelerated to accommodate the interests of other litigants, the LP's interests in a fully developed record are prejudiced. The LP objects to the state's characterization of this case as "ripe for adjudication."

Second, the State didn't move for summary judgment on the 17th as required by the court's scheduling order. Its current request for summary judgment filed on July 1, 2005 (CD 65, at 4) is therefore untimely under this court's scheduling order. If the court is going to consider the State's motion for summary judgment outside of the requirements of the scheduling order the LP should be allowed to submit responsive materials, including affidavits, declarations and other evidence, up to the date of hearing, according to the terms of Rule 56.

FACTUAL CORRECTIONS TO THE RESPONSE BRIEFS

The State incorrectly argues that the "blanket primary" invalidated by *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (C.A.9 2003)(*"Reed"*) "was designed to, and did, advance to the general election ballot a candidate representing

each of the major political parties." (CD 65 at 6)[1] To the extent this is true at all it is the result of political party perseverance, and in spite of state action. Under the blanket primary system only minor political parties could directly nominate their candidates through the mechanism of nominating conventions. The blanket primary allowed no similar mechanism for major political parties to qualify or screen candidates as party standard bearers. Any person could designate any major political party on his or her declaration of candidacy and there was no statutory guarantee that a plurality winner was a member of that party or adhered to its message.

Second, contrary to the State's assertions, I-872 did not "eliminat[e] party affiliation as a factor in determining whether candidates advance to the general election ballot." (CD 65, at 8) A candidate's political party "preference" is published to voters in three instances that are most critical to the election process. I-872 §§ 7(3), 11. By I-872's own terms party affiliation is "a factor" in the election system it creates.

Third, the Grange mistakenly alleges the LP is "forsaking its core values of individual privacy and freedom from government restraint," by forcing voters to disclose their "political leanings" when they vote in September, and by depriving candidates of their right to state their political "preferences." (CD 70, at 1). This is nonsense. The LP has never

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[1] The Grange makes a similar mistake, claiming the "*result* was the selection of the ***political parties'*** candidates for the November ballot." (CD 70, at 4)(emphasis in original).

advocated in favor of the "Montana" primary.[2] The LP argues here for the right to nominate by convention and to have the results recognized by the State. Candidate statements of "preference," according to the LP, become problematic only when they mislead the public as to whom the candidates represent.

Finally, the Grange claims a "long, proud history of opposing powerbrokers and special interests." CD 70, at 5). The Grange fails to recognize it has been at it for so long that it has become what it opposes.[3]

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[2] Some Libertarians argue the Montana system works against the Libertarian Party. But for a sympathetic ruling in state court the LP would not have had candidates on the November 2004 ballot for Governor or U.S. Senator.

[3] "The Grange argues that Grange members support water and public utilities for farms and that its members' rights to advance their rural agenda in both parties will suffer if each Granger is forced to choose a party ballot. The Grange says that it spearheaded the initiative in 1933 that led Washington to adopt the blanket primary, which has successfully prevented "a politically corrupt nominating process controlled by political bosses or special interests." "Special interests" are evidently in the eye of the beholder. Some urban voters might think that special protection for rural water and electricity concerns serve a "special interest" of farmers, and that the Grange is a special interest group." Reed, 343 F.3d at 1206.

DISCUSSION

I. WHETHER I-872 "NOMINATES POLITICAL PARTY CANDIDATES"

Stipulated Issue #1 Is Not The Threshold Issue

The fundamental assumption of the "top two" election model is that the purpose of elections is to elect public officials, not to serve as a general forum for political expression. "If you want to win, you have to appeal to and receive the voter's support." Grange Brief (CD 70, at 23). This limited view is, at best, oversimplified and ignorant of contemporary understandings of the election process.

Modern social science theorists applying a "rational choice" model teach that political party adherents, voters and candidates all view politics as a competitive market. Under a given set of electoral rules voters and candidates make rationally self-interested decisions about politics in much the same way consumers of goods and services make decisions about economic matters.[4] The consequence is candidates often run (or not) and voters often vote (or not) not to win or back a winner but to make a political statement.[5]

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[4] See e.g., John H. Aldrich, *Why Parties? The Origin And Transformation Of Political Parties In America* 12-13 (1995).

[5] See, e.g., Dennis F. Thompson, *Just Elections: Creating A Fair Electoral Process In The United States*, 24 (2002) ("Elections are not only instruments for choosing governments; they are also media for sending messages about the democratic process.").

Five decades ago Professor McLuhan taught us "the medium is the message." The Grange recognized that election systems are not merely administrative procedures but have substantive policy content when it argued in the Voter's Pamphlet: "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." (CD 66, Exh. A at 4). Compare, *California Democratic Party v. Jones*, 530 U.S. 567, 580 (2000) (whole *purpose* of Proposition 198 was to favor nominees with "moderate" positions).

But some political actors, such as the LP and its adherents, are more interested in effectively promulgating an ideological message than in winning. And the Supreme Court has recognized the right of individuals and political parties to do exactly that. *Norman v. Reed*, 502 U.S. 279 288-289 (U.S., 1992).

This is why Stipulated Issue #1 is really not the threshold issue. The threshold issue should be: "Does I-872 impermissibly infringe upon constitutional rights of political parties, candidates and voters in a partisan election system?"

Reed puts it succinctly. "As for the State of Washington's argument that the party nominees chosen at blanket primaries are the 'nominees' not of the parties but of the electorate, that is the problem with the system, not a defense of it. Put simply, the blanket primary prevents a party from picking its nominees." 343 F.3d at 1204 (footnote omitted) Regardless how much the State and Grange want to re-characterize the issue, I-872 does the same thing.

The Grange and the State both argue because I-872 is not intended to "nominate political party candidates" it is constitutionally valid. Both seek to cut political parties out of an unequivocally partisan election system. See, e.g., I-872, § 4. The Grange virtually ignores party nomination rights; focusing instead on what it believes are the rights of candidates and voters. (CD 13, 16, 24, 29, 30, 31) The State makes the doubtful[6] claim that the right of political parties to nominate is a "private" right that the state need not recognize. (CD 65, at 12, 27, 32) Similar arguments that the political parties are free to endorse candidates were explicitly rejected in *Jones*, 530 U.S. at 580 ("The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee.")

The "top two" model impoverishes the First Amendment rights of voters by depriving them of substantive choices at the general election—giving them choices tantamount to "Ford" or "Chevy," meanwhile depriving them of the opportunity to choose "Dodge," "Lexus," "Hummer" or "Mini Cooper" in the election that matters.[7] It deprives candidates

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[6] See, *Brower v. Washington*, 969 P.2d 42 (1998); cert. den., 526 U.S. 1088 (1999)(elections are public functions held for a governmental purpose)

[7] "Nothing is more plain to the student of history than the tendency of one party [in a two party system] to assimilate the principles and the policies of its opponent." Andrew C. McLaughlin, *Political Parties and Popular Government*, in *The Courts, the Constitution and Parties*, 151 (1912). "We choose between Tweedledum and Tweedledee." Helen Keller, *Letter to Mrs. Grindon*, Jan. 12, 1911. Published in the *Manchester Advertiser*, Mar. 3, 1911.

of First Amendment rights of association by forcing them to run as "independents" whether they want to or not. It emasculates the First Amendment association and Fourteenth Amendment liberty rights of political parties by statutorily separating them from the very process for which they are formed to participate.

By failing (or refusing) to include a political party nomination mechanism within its partisan scheme I-872 deprives all political actors of their rights. I-872 favors centrist or "moderate" candidates over ideological or programmatic candidates, which function was expressly rejected in *Jones*, 530 U.S. at 580. This is why I-872 must fail, to protect the losers.

I-872 Is Not A Nonpartisan Primary

The State grasps at the *nonpartisan* language in *Jones*, as it did similarly in *Reed*, to support its argument that I-872 does not nominate political party candidates.[8] But I-872 is not the "*nonpartisan* blanket primary" envisioned by *Jones*. If the sponsors of I-872 really intended for primaries to be truly *nonpartisan* they could very easily have removed all references to political parties from the statutes and adopted a general petition requirement for access to the ballot. Instead, the sponsors fashioned a system that not only did not remove references to political parties but also included a *new section* defining "partisan office." See I-872 § 4.

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[8] The Grange argues the matter similarly. (CD 70, at 5, 24, 25).

Jones specifically contemplated a *nonpartisan* system that included "nomination by established parties ***and*** voter-petition requirements for independents." *Jones*, 530 U.S. at 585 (emphasis added). Except to the extent it may have left minor party nominating statutes in place,[9] I-872 does neither. Hanging their entire analysis on the word "may" both defendants argue at great length they can add whatever qualifications for ballot access they wish, and that they are not confined to the ones outlined in the paragraph. (CD 65, at 17-19; CD 70, at 24-25). As will be seen in Part V below, the state is not free to configure ballot access qualifications outside constitutional limits.

Second, the defendants' arguments completely miss the central point of both *Jones* and *Reed*. As *Reed* explained: The rights of "those who actively participate in partisan activities ... to freely associate for this purpose is thwarted because the Washington statutory scheme prevents those voters who share their affiliation from selecting their party's nominees. *Reed*, 343 F.3d at 1204. A thorough reading of both cases reveals the overwhelming concern of both courts was not to parse out a *nonpartisan* "safe harbor" but to ensure that the expressive association rights of political party adherents were protected where they mattered most, in the election process.

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[9] See, Part II, infra.

II. WHETHER POLITICAL PARTIES HAVE THE RIGHT TO NOMINATE

The State Artfully Dodges the Question

Distilled to its essence, State does not argue against a political party's right to nominate candidates per se, which right the LP contends is *sui generis*, but rather whether any candidate nominated by the political party has a right of access to the general election ballot. This issue is treated more fully in Part V, below.

Validity of the Minor Party Nominating Statutes

As previously argued, I-872 did not repeal, amend or otherwise address the minor party nominating statutes. R.C.W. §§ 29A.20.110 through 29A.20.20[10] Section 9(3) of I-872 allows any candidate access the primary ballot and to enter a minor political party "preference" on his or her declaration of candidacy without any further qualification but payment of a filing fee. However, the minor political party nominating statutes include a provision that candidates so nominated would appear on the general election ballot. R.C.W. § 29A.20.121(1).

In lengthy footnotes (CD 65, at 9 n. 6; at 16 n. 14, and at 22 n. 17) the State attempts to gloss over its treatment of the issue, arguing that I-872 impliedly repealed the minor party nominating statutes.

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[10] Throughout this section references are made to the newer minor party nominating statutes. However, the reasoning should also apply to the older statutes.

> Repeal or amendment by implication is never favored [in Washington]. *Generaux v. Petit*, 172 Wash. 132, 19 P.2d 911 (1933). This is even more true when a later act contains a schedule of statutes repealed and such schedule does not include the statute under consideration. *State ex rel. Spokane v. DeGraff*, 143 Wash. 326, 255 P. 371 (1927).

Washington State Welfare Rights Organization v. State, 82 Wash.2d 437, 439, 511 P.2d 990 (1973).

Section 17 of the initiative, while purportedly repealing statutes inconsistent with I-872, did not repeal the minor party nominating statutes.

The State also argues that other statutes related to primaries, such as R.C.W. § 29A.52.116 (relating to nomination of major party candidates at primaries) are "obsolete." (CD 65, at 19, n. 16) This raises the question: How much of Washington's prior election system is no longer operative after I-872?

I-872 plainly did not reach the entire field of elections, because it did not address the classifications of "major" and "minor" political parties in any way. A "Major political party" is one whose candidate for statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year. R.C.W. § 29A.04.086. If I-872 does not "nominate political party candidates" what is the point of the statute?

Statutes relating to Precinct Committee Officers present another problem. They are a recognized internal part of the political party organizational apparatus. See, generally, Chapter 29A.80, R.C.W. However, R.C.W. § 29A.80.051 provides that PCOs are elected at the primaries, yet the State argues the I-872 primary does not "nominate political party candidates."

The LP does not seek resolution from this court whether these provisions are impliedly repealed, amended, obsolete or otherwise inoperative. Instead, the LP merely wants to show that I-872 did not, as the both the Grange and the State suggest, "cover the entire subject matter." Here the LP is concerned solely with the validity of the minor party nominating statutes.

In determining whether I-872 impliedly repealed, amended or otherwise rendered inoperative the minor party nominating statutes, "[t]he collective intent of the people becomes the object of the court's search for 'legislative intent' when construing a law adopted by a vote of the people. E. Crawford, *The Construction of Statutes*, § 365 (1940 ed.) p. 745." *Washington State Dept. of Revenue v. Hoppe*, 82 Wash.2d 549, 552, 512 P.2d 1094 (1973). To ascertain the collective purpose and intent of the people, material in the official voters' pamphlet may be considered. *Hi-Starr, Inc. v. Washington State Liquor Control Bd.*, 106 Wash.2d 455, 460-461, 722 P.2d 808 (1986) (citations omitted).

The voter's pamphlet states, "I-872 will restore the kind of choice in the primary that voters enjoyed

for 70 years in the blanket primary."[11] Until the blanket primary was invalidated it included minor party candidates who had been nominated by conventions. The pamphlet also refers voters to the I-872 sponsor's website. That website, entitled: "Initiative 872 - Preserve the Blanket Primary"[12] contains the following dialogue under "Frequently Asked Questions."

> "Would this proposal eliminate minor party candidates from the primary or general election ballot?"
>
> "No. Minor parties would continue to select candidates the same way they do under the blanket primary...."[13]

Since minor parties selected their candidates by nominating convention under the blanket primary—using the primary only for the purpose of demonstrating a "modicum of support" and thus to gain access to the general election ballot, see, *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986)—the initiative sponsors may have intended that minor parties would continue nominating candidates by convention.[14] But the Grange is strangely silent on

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[11] See, Declaration of James Pharris, Exhibit A, page 4 (CD 66)

[12] This title to the website speaks volumes about the legislative intent of the sponsors of I-872.

[13] See, http://www.i872.org/faq.php. The entire text of the Frequently Asked Questions page from the I-872 website is already a part of the record as Exhibit 3 to the Declaration of John White (CD 8).

[14] Here the Declaration of Kevin Hansen, becomes important. The state asks this court to strike that declaration

the issue and the State applied a different interpretation to the legislative intent for I-872, promulgating emergency rules[15] declaring that I-872 "impliedly amended" the minor party nominating convention statutes. (CD 65, at 22 n. 17).

The Grange addresses the issue only tangentially, arguing "Washington law holds that the People's right to enact State laws by initiative or referendum may not be frustrated by legislation passed after a ballot measure is filed but before it is voted upon." (emphasis in original, citation omitted) (CD 70, at 21, n. 30) The result of this line of reasoning is merely that if any minor party nominating statutes are still effective they are the ones in effect at the time I-872 was filed (December, 2004).[16]

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for timeliness and relevance reasons. Mr. Hansen's declaration is timely because the Libertarian Party is relying upon it in response to the State's untimely Motion for Summary Judgment. It is relevant because it shows that the President of the Senate had determined that legislation repealing the minor party nomination statutes as proposed by the Secretary of State, HB 5745, would require a 2/3 vote under Washington Constitution, Art. II, § 1(c), because the bill represented a material alteration to the initiative. (CD 64, Ex. C, page 24 of 24).

[15] See, Exhibit C to Declaration of James Pharris (CD 66).

[16] Chapter 29.24, R.C.W., (recodified and/or amended – depending whom you ask – approx. 2004). The significant differences between the old and new minor party rules related to the number of signatures required for a particular office and whether a certificate of nomination entitled a candidate to appear on the primary ballot or the general election ballot.

Identity, Not Truthfulness, Is The First Amendment Issue

The Grange complains that the LP wants the right of "prior restraint," i.e., the "right to approve of the truthfulness of a candidate's statement of preference." (CD 70, at 26, 30). This is absurd. The LP claims no right to regulate the speech of one who does not purport to speak in the name of the LP. However, the LP knows full well that political campaign speech is rarely "truthful," and it is for precisely this reason the LP claims a right to protect its identity by assuring that its message, and not someone else's, is promulgated in its name. "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (U.S., 2000). This issue is discussed in further detail at Part IV, below.

III. WHETHER I-872 COMPELS POLITICAL PARTIES TO ASSOCIATE WITH UNAFFILIATED VOTERS OR VOTERS AFFILIATED WITH OTHER PARTIES

The State concedes, if I-872 nominates political party candidates, then it "would indeed trigger a need to respect the associational rights of the political parties." (CD 65, at 25). The Grange argues that I-872 doesn't "compel the parties to do anything." (CD 70, at 32). This is simply another way of saying that the Grange wants to exclude the political parties from what is, by design, a partisan election system. As *Reed* has clearly taught us, "that

is the problem with the system, not a defense of it." *Reed*, supra.

IV. WHETHER I-872 FORCES A POLITICAL PARTY TO ASSOCIATE WITH CANDIDATES WHO DO NOT SHARE THE PARTY'S MESSAGE

Here again both defendants premise their argument on the assumption that I-872 does not nominate political party candidates. (CD 65, at 28) (CD 70, at 33). And again, "that is the problem with the system, not a defense of it." *Reed*, supra.

Party Trademark or "Brand" Rights

The State suggests that I-872 makes "party nominations an entirely private process." (CD 65, at 27). Assuming for the purpose of argument that this is true then the political parties have the right, as private entities, to protect use of their trademarked names. As the LP has previously shown, the term "Libertarian Party" is a registered trademark.[17]

> The fundamental purpose of a trademark is to reduce consumer search costs by providing a concise and unequivocal identifier of the particular source of particular goods. The consumer who knows at a glance whose brand he is being asked to buy knows whom to hold responsible if the brand disappoints and whose product to buy in the future if the brand pleases. ... *A*

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[17] See, Exhibit F to Declaration of Richard Shepard (CD 51)

> *successful brand, however, creates an incentive in unsuccessful competitors to pass off their inferior brand as the successful brand by adopting a confusingly similar trademark, in effect appropriating the goodwill created by the producer of the successful brand.*

Ty Inc. v. Perryman, 306 F.3d 509, 510 (7th Cir., 2002) (emphasis added).[18]

It is common knowledge that the name of a political party implies certain political views. The defendants obviously recognize the value of a political party name because they go to great lengths to assure that political party "information" goes to the voters whether or not the political parties have any control over who uses (or abuses) it. Just as clearly the Grange recognized a "*nonpartisan* blanket primary"[19] would increase the difficulty for each and every voter to question each and every candidate thoroughly in an effort to ascertain his or her political platform. It is the express intention of I-872 that voters use that political party name (a/k/a "information") to determine for whom to vote.

Thus the sponsors devised a scheme to co-opt the reputation and prestige of political party names

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[18] Many modern social scientists believe that participants view the election process as a "competitive marketplace" similar to the economic marketplace involving consumer goods and services. See, n. 8, supra. If so, then there is no reason why the protections available under trademark law should not be available to political actors.

[19] See, discussion supra, at n. 4, and accompanying text.

but which necessarily introduces the risk that voters will get an inferior "imposter" candidate "passing off" a party name, thus misleading the voters at the expense of the political parties' rights.

The Right to Exclude Candidates Who Do Not Follow Party Rules

The state focuses on a single case (among several) involving the right of political parties to determine their association with particular candidates. *Duke v Massey,* 87 F.3d 1226 (11th Cir. 1996). Even here the State acknowledges one of the recognized bases for affirming the exclusion of David Duke from the Republican ballot was that the Republican Party did not consider Duke to be a member of the party. Despite the several other reasons that may have informed the *Massey* holding, none of the cases in this category suggest that a political party does not have the right to exclude unacceptable candidates.

In *Ray v. Blair,* 343 U.S. 214, 72 S.Ct. 654 (1952), the court held a requirement that candidates of a political party in a primary election pledge support to the party's nominees does not deny equal protection or due process. "A state's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy and leadership of that party." *Blair,* 343 U.S. 214, 227, 72 S.Ct. 654 (1952)

This party right is not a function of state statute. *Democratic Party of U. S. v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 101 S.Ct. 1010 (1981)

held that Democratic Party rule, not state law, determined the right. "On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing the party's essential functions—and that political parties may accordingly protect themselves 'from intrusion by those with adverse political principles.'" *La Follette,* 450 U.S. at 122 (citing to *Blair,* 343 U.S. *at 221-222*) Neither are *Blair* or *La Follette* confined to strictly internal party operations. *Jones,* 530 U.S. at 576 n. 7.

The LP requires that candidates representing the LP shall be members of the LP, and further that in order to become a member of the LP one must subscribe to or affirm a "non-aggression pledge."[20] The State has advanced no reason why the LP cannot, as *Ray* did, require candidates for partisan office to execute a pledge it requires of all members of the LP who wish to be candidates, and to exclude from the ballot any candidate who refuses to do so.

V. WHETHER I-872 UNCONSTITUTIONALLY LIMITS BALLOT ACCESS RIGHTS

Of core concern to any ballot access analysis is the requirement that the election laws "do not operate to freeze the political status quo ... [and at the same time] recognize[] the potential fluidity of American political life." *Jenness v. Fortson,* 403 U.S. 431, 438-439 (U.S., 1971) I-872 fails both tests.

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[20] See, Exhibit E to Declaration of Richard Shepard. (CD 51)

The State implies that ballot access is a party rights issue, when in fact it is a candidate's rights and voter's rights issue. *Dart v. Brown*, 717 F.2d 1491, 1499 (5th Cir., 1983)("If it had no candidate to offer, a political party would neither seek nor gain access to the ballot.")[21] "Restrictions on access to the ballot burden two distinct and fundamental rights, the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) I-872 interferes with the associational rights of candidates and their supporters by forcing all candidates to run as independents, i.e., statutorily disconnecting the political party from the candidate and the election process itself.[22] It also undermines the right of voters to cast their votes effectively by limiting their substantive choices at the general election (the one that counts) to two only.[23]

Only A "Modicum of Support" May Be Required for Ballot Access

The State relies on *Munro*, which held, *inter alia*, "We think that the State can properly reserve the general election ballot 'for major struggles,' . . . by conditioning access to that ballot on a showing of

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[21] This is why individual party plaintiffs Ruth Bennett and J. Mills are in the case.

[22] See, Parts I, II, and IV, supra.

[23] See, Part I, supra. Some opponents of I-872 have called it "the People's No-Choice Initiative."

a modicum of voter support."[24] *Id.* at 196 (quoting *Storer v. Brown*, 415 U.S. 724, 735, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974))" The State suggests the "major struggles" language here justifies the "top two" provisions of I-872. (CD 65, at 20). The State again relies on *Munro* to argue that a state can require candidates to demonstrate a "modicum of community support in order to advance to the general election." *Munro*, 479 U.S. at 197. (CD 65, at 29).

But access rights to the general election ballot are not predicated on a candidate's ranking within a field of candidates after a primary election. Nothing in *Munro* (or any of the other ballot access cases) suggests that a state can require *more than* a "modicum of support" for access to the general election ballot. The Supreme Court has signaled that 5% is probably the highest limit it is likely to approve. *Storer v. Brown*, 415 U.S. 724, 739 (U.S., 1974)(footnote omitted). Regardless of the method of calculation used, I-872 will require between 20% and 35% to advance to the general election.[25]

I-872 Improperly Allows Candidates Only One Route To The General Election Ballot

The defendants argue since I-872 "treats all candidates the same" (CD 65, at 31), cf., Grange Brief (CD 70, at 2) the political parties cannot claim

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[24] The "modicum of support" test at issue in *Munro* is the so-called "one-percent" rule, which required all candidates to poll at least 1% of the total vote cast for the office to advance to the general election ballot. It was not, as the State seems to imply, placing first or second in the contest.

[25] See, Exhibit C to Declaration of Richard Shepard (CD 51), and Declaration of Richard Winger, filed herewith.

any discrimination. This is precisely the problem. Under I-872 there is only one route to the general election ballot, by coming in first or second in the primary.[26]

> "The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. ... Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams v. Rhodes*, [393 U.S. 23 (1968)]." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

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[26] While I-872 does not address the "write-in candidate" statute, R.C.W. § 29A.24.311, which allows a candidate to seek direct access to the general election ballot by write-in votes, the State's position that the minor party nominating statutes have been "impliedly amended" may mean that the write-in statutes have also been affected. Regardless, the LP notes that write-ins are disfavored as a meaningful mechanism for ballot access. "[I]n *Lubin v. Panish*, 415 U.S. 709 (1974), the Court characterized as "dubious at best" the intimation that a write-in provision was an acceptable means of ballot access: "The realities of the electoral process... strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot.... That disparity would, itself, give rise to constitutional questions...." Id., at 719 n. 5." *McCarthy v. Briscoe*, 429 U.S. 1317, 1321 (U.S., 1976) In any event, the write-in statute has nothing to do with the right to ***appear*** on the general election ballot.

This observation applies equally to independent or unaffiliated candidates.

> It may be that the 1% registration requirement is a valid condition to extending ballot position to a new political party. Cf. *American Party of Texas v. White*, 415 U.S. 767 (1974). But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other.

Storer v. Brown, 415 U.S. 724, 745 (U.S., 1974) (cited with approval in *McCarthy v. Briscoe*, 429 U.S. 1317, 1320 (U.S., 1976)).

The number and reasonableness of alternative routes to the general election ballot has been a major factor in the result of several ballot access cases, e.g., *Jenness*, supra, *Storer*, supra, *American Party*, supra, and *McCarthy*, supra. *Burdick v. Takushi*, 504 U.S. 428 (1992), which upheld Hawaii's elimination of the write-in route, noted Hawaii had 3 alternative routes to the ballot. None of the ballot access cases suggest that the state may provide only one route to the general election ballot and then limit that general election ballot only to two candidates who have obtained the most votes in a prior popularity contest.[27] Even the infamous *"nonpartisan* blanket

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[27] *Foster v. Love*, 522 U.S. 67 (U.S., 1997), the only Supreme Court case addressing an election system remotely similar to I-872, related to "the day" for federal elections, not access to the final ballot. See, discussion regarding time for federal elections, infra.

primary" paragraph in *Jones* 530 U.S. at 585, required two alternative routes.

I-872 Sets An Unconstitutional Time For Federal Elections

"A primary is a first stage in the public process by which voters elect candidates to public office." I-872 § 7(1). The Grange refers to the "top two" system as a "two-stage" public election process. (CD 70, at 13, 28, 33, 34). The State argues "[t]he general election is a 'runoff' between the two candidates gaining the most votes in the primary." (CD 65, at 8).

Foster v. Love, 522 U.S. 67 (U.S., 1997) addressed the timing of federal elections and held that the first Tuesday after the first Monday in November of even numbered years was "*the day*" for federal elections. *Id.*, 522 U.S. at 71 (quotes in original, emphasis added). There is nothing in the U.S. Constitution or the U.S.C. that suggests federal elections can be held in two stages, much less over the course of six weeks. Further, to the extent runoffs are necessary, they must be held after "the day" for federal elections. 2 U.S.C. § 8. Accordingly I-872 violates federal law as to the time of elections for federal offices.[28]

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[28] Cf. Jones, 530 U.S. at 580 ("In effect, Proposition 198 has simply moved the general election one step earlier in the process, at the expense of the parties' ability to perform the "basic function" of choosing their own leaders.")(citation omitted).

I-872 Imposes Unconstitutional Qualifications For Federal Office

As above, placing first or second in the primary is the only way a candidate will appear on the general election ballot. By eliminating all other routes to the general election ballot, I-872 has added an unconstitutional "qualification of membership" in Congress, i.e., winning or placing in an expensive and non-dispositive popularity contest.

Powell v. McCormack, 395 U.S. 486 (1969), noted the framers considered a proposal to allow property ownership qualifications for membership in Congress:

> James Madison urged its rejection, stating that the proposal would vest
>
> "an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well *by limiting the number capable of being elected,* as the number authorised to elect. . . . It was a power also, which might be made subservient to the views of one faction agst. another. *Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of [a weaker] faction.*" [2 Records of the

> Federal Convention of 1787], at 249-250. Significantly, Madison's argument was not aimed at the imposition of a property qualification as such, but rather at the delegation to the Congress of the discretionary power to establish any qualifications.

Powell, 395 U.S. at 533-534(emphasis added).

I-872 creates an "artificial distinction" by "limiting the number capable of being elected" to two, in which "the stronger" (i.e., the better connected and better financed) ***will*** "keep out" the "weaker faction," in an election that the state itself calls a "qualifying" election. (CD 65, at 21).

At several times throughout *U.S. Term Limits V. Thornton*, 514 U.S. 779 (1995), the Supreme Court recognized the pernicious side effects of allowing Congress or the states to add qualifications to membership in Congress. The court recognized "the more practical concern that reposing the power to adopt qualifications in Congress would lead to a self-perpetuating body to the detriment of the new Republic." *Thornton*, 514 U.S. at 794, n. 10. (citing to *Powell*, 395 U.S. at 533-534) Again citing to *Powell* the court: "noted that 'restrictions upon the people to choose their own representatives must be limited to those 'absolutely necessary for the safety of the society." *Thornton*, 514 U.S. at 795 (citing *Powell*, 395 U.S. at 543). I-872 will lead to a self-perpetuating governing bodies and is not even remotely necessary. It cannot be allowed to stand.

CONCLUSION

For the foregoing reasons I-872 should be found unconstitutional on its face and in its entirety as a deprivation of the Libertarian Party's rights under 42 U.S.C.§ 1983. The government defendants should be enjoined from implementing I-872 in any way.

DATED Wednesday, July 06, 2005, at Tacoma, Washington.

SHEPARD LAW OFFICE, INC.,

Richard Shepard

RICHARD SHEPARD, WSBA # 16194
Attorney for Proposed Interveners
LIBERTARIAN PARTY OF
WASHINGTON STATE, RUTH
BENNETT, and J. S. MILLS

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Intervenors, LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Intervenors, vs. DEAN LOGAN, King County Records & Elections Division Manager, et al., Defendants, STATE OF WASHINGTON, et al., Defendant Intervenors, WASHINGTON STATE GRANGE, et al., Defendant Intervenors.	NO. CV05-0927-TSZ SUPPLEMENTAL DECLARATION OF KEVIN B. HANSEN NOTE ON MOTION CALENDAR: Wednesday, July 13, 2005 WITH ORAL ARGUMENT

KEVIN B. HANSEN declares under penalty of perjury under the laws of the State of Washington and the United States of America as follows:

1. I am one of the attorneys for the plaintiffs in this lawsuit, am competent to testify,

and make this declaration of my own personal knowledge.

. . . .

3. Attached hereto as Exhibit 1 is a true and correct copy of a press release dated January 8, 2004 and entitled "Grange Files Initiative to Preserve State's Primary System," which is available on the "Yes on 872" website at www.blanketprimary.org/pressroom/release-2004-01-08.php.

SIGNED this 6th day of July, 2005 in Kirkland, Washington.

Kevin B. Hansen

KEVIN B. HANSEN

EXHIBIT 1
to
Supplemental Declaration
of
Kevin B. Hansen

[Yes on 872 web page header omitted]

NEWS RELEASE

January 8, 2004

For Immediate release

GRANGE FILES INITIATIVE TO PRESERVE STATE'S PRIMARY SYSTEM

Washington State Grange President Terry Hunt filed an initiative today with the Secretary of State to protect the state's primary system from attacks by the major political parties.

"This is basically a back-up plan in case the U.S. Supreme Court doesn't accept our request for review of the Ninth Circuit Court decision against Washington State's blanket primary," said Hunt. "We believe that the Supreme Court will eventually uphold our blanket primary, but we need to be prepared if that does not happen.

"We hope to know by March whether or not the U.S. Supreme Court will hear the blanket primary case. If they do hear the appeal, then everything will be on hold until next year," Hunt pointed out.

"For seventy years under the blanket primary system, the voters of this state have chosen which candidates advance to the general election ballot. Now the major political parties are trying to take that away from the voters. This proposed initiative will ensure that the candidates who appear on the general election ballot are those who have the most support from the voters – not just the support of the political party leadership."

The voters of Washington overwhelmingly support the blanket primary. In a blanket primary, the voter does not have to declare political party affiliation at any stage of the process and may vote for any candidate for any office on the primary ballot.

"The major political parties are going to try to convince the Legislature and the public that the only way to change the primary system is to restrict voters' choices in the primary and to force independent voters out of the primary altogether," Hunt explained. "This is simply not true. We can continue to have all of the benefits of the blanket primary, including the right of a voter to pick any candidate for any office."

The proposed initiative would replace the current nominating system with a qualifying primary, similar to the nonpartisan primaries used for city, school district, and judicial offices. As in those primaries, the two candidates who receive the greatest number of votes would advance to the general election. Candidates for partisan offices would continue to identify a political party preference when they file for office and that designation would appear on both the primary and general election ballots.

"We want the Legislature to know that there are alternatives to the restrictive proposals the political parties are trying to push," Hunt said. "And we want the voters to know that they can continue to have a primary where they choose the candidates that go on the general election ballot. If the Court rules against the blanket primary and the Legislature doesn't adopt a system that preserves the rights that voters

now enjoy under the blanket primary, we are ready with an Initiative that will do just that."

The Washington State Grange is the key player in efforts to retain the state's decades-old blanket primary. The current primary system – which is being attacked in court by the political parties – was put into place due to Grange action in the 1930s.

####

For your information, the following background information has been placed on our website:

A. The text of the initiative filed today (http://www.blanketprimary.org/text.php)

B. A FAQ page answering many questions about our primary (http://www.blanketprimary.org /faq-jan2004.htm)

C. A chart showing differences between Washington State's primary and those of other states (http://www.blanketprimary.org/com parison.htm)

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE.

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, and WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Intervenors, and LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Intervenors, v. STATE OF WASHINGTON, et al., Defendants, and WASHINGTON STATE GRANGE, Defendant Intervenors.	No. CV05-0927Z SECOND DECLARATION OF DAVID T. McDONALD IN SUPPORT OF PLAINTIFF INTERVENOR WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S REPLY TO ITS MOTION FOR SUMMARY JUDGMENT **Noted for Oral Argument:** **July 13, 2005 @ 9:00 a.m.**

1. I am the lead attorney for Plaintiff in Intervention the Washington State Democratic Central Committee in the above-entitled action. I am over the age of eighteen years and I am

competent to make this declaration. I make this declaration based on my own personal knowledge.

2. Attached as Exhibit A is a true and accurate copy of a news release dated April 1, 2004 entitled *Grange Launches "People's Choice" Initiative Campaign in Response to Governor's Veto*, which is available on the "Yes on 872" website at www.i872 .org/pressroom/release-2004-04-01.php. This document was printed from that website on July 6, 2005.

3. Attached as Exhibit B is a true and accurate copy of the Washington State Grange Executive Committee Minutes dated March 31, 2004, which is available on the Washington Public Disclosure Commission's website. This document was printed from that website on July 6, 2005.

DATED this 6th day of July, 2005.

David T. McDonald

David T. McDonald

EXHIBIT A

[YES ON 872 internet header omitted]

NEWS RELEASE

April 1, 2004

For immediate release

GRANGE LAUNCHES "PEOPLE'S CHOICE" INITIATIVE CAMPAIGN IN RESPONSE TO GOVERNOR'S VETO

The Washington State Grange announced today that it is now collecting signatures for I-872 (the "People's Choice" initiative) to run on the November ballot.

The initiative will institute a "modified" blanket primary system (also known as a qualifying primary) in which voters will not be restricted to choosing among the candidates of only one party in a primary election. Voters will also not be required to declare party affiliation when registering.

The initiative would implement a "top-two" system in which the two top vote-getters in a primary election advance to the general election, regardless of party.

"Our initiative will put a system in place which looks almost identical to the blanket primary system we've been using for nearly 70 years," said Grange President Terry Hunt. "The only difference is that this system will satisfy the constitutional requirements set forth by the courts."

The campaign was launched in response to Gov. Locke's partial veto of Engrossed Senate Bill 6453, which was passed by the legislature last month. The bill would have put a top-two system in place, which would then revert to a Montana-style system in the

event that legal challenges by the political parties resulted in a successful ruing.

However, the Gov. Locke vetoed the "top-two" system out of the bill, leaving only the Montana-style system in it's place. Under this system, voters are required to choose a ballot from only one party at a primary election.

"The Governor defied the will of the voters, and he defied the will of the legislators elected to represent those voters," said Hunt. "By changing the intent of the bill, he will have to face not only our initiative campaign, but a law suit by the Grange as well. He simply can't veto the qualifying primary out of a bill that is titled 'Enacting a Qualifying Primary.'"

###

For more information, contact David Burr, Communications Director, (360) 943-9911.

EXHIBIT B

Washington State Grange Executive Committee Minutes

Conference Call

March 31, 2004

Worthy Master Terry Hunt called the Washington State Grange Executive Committee special meeting to order at 2:00 pm on March 31, 2004. All committee members were on the line.

Worthy Master Terry Hunt reported that the Governor is expected to take action on ESB-6453 tomorrow, April 1, 2004. If the Governor Veto's the top two out of the bill as suspected, we will be obligated to run Initiative 872, the People's Choice Initiative.

Worthy Master Terry Hunt briefed the committee on paid signature collecting organizations and the Initiative drive.

Being no further business, the executive committee meeting adjourned at 2:45 pm.

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, CHRISTOPHER VANCE, BERTABELLE HUBKA, STEVE NEIGHBORS, BRENT BOGER, MARCY COLLINS, MICHAEL YOUNG, Plaintiffs, v. DEAN LOGAN, King County Records & Elections Division Manager; BOB TERWILLIGER, Snohomish County Auditor; VICKY DALTON, Spokane County Auditor, GREG KIMSEY, Clark County Auditor, CHRISTINA SWANSON, Cowlitz County Auditor, VERN SPATZ, Grays Harbor County Auditor, PAT GARDNER, Pacific County Auditor, DIANE L. TISCHER, Wahkiakum County Auditor, and DONNA M. ELDRIDGE, Jefferson County Auditor, Defendants.	NO. 05-0927 Z STATE INTERVENORS' ANSWER TO COMPLAINT IN INTERVENTION OF WASHINGTON DEMOCRATIC CENTRAL COMMITTEE

As and for an Answer to the Complaint in Intervention filed in this matter by the Washington State Democratic Central Committee, the State Intervenors admit, deny, and allege as follows:

I. NATURE OF ACTION

1. Paragraph 1 of the Complaint purports to be a paraphrase and summary of the constitutional rights of political parties, including a quote from case law. This paragraph amounts to legal argument and does not require an answer. To the extent an answer is appropriate, the State denies that Paragraph 1 is an accurate summary of the law. The quote is accurate but misleading when removed from its context.

2. Paragraph 2 of the Complaint consists of legal argument concerning the "fundamental purposes of the First Amendment" and does not require an answer. To the extent an answer is appropriate, the State asserts that Paragraph 2 is irrelevant to this case, as Washington law does not implicate the principles there advanced.

3. Responding to Paragraph 3 of the Complaint, the State admits that Initiative Measure No. 872 (I-872) was enacted through voter approval of an initiative measure, and took effect on or about December 2, 2004. The remainder of Paragraph 3 consists of legal argument concerning the legal effect of Washington state law. To the extent an answer is required, the State denies that Paragraph 3 accurately states the law or accurately characterizes either the intent or the behavior of the State and its officers and employees.

4. Paragraph 4 of the Complaint consists of speculation concerning the intent behind the adoption of I-872 and argument concerning its legal effect. To the extent an answer is required, the State denies that Paragraph 4 accurately characterizes the

intent of the initiative measure or its effect on political parties.

5. Responding to Paragraph 5 of the Complaint, the State understands that the Plaintiffs have filed this action to protect what the Democratic Party Plaintiffs assert to be First Amendment rights. The State denies that I-872 censors or interferes with the rights of the plaintiffs, and denies that I-872 is unconstitutional.

II. JURISDICTION AND VENUE

6. In response to Paragraph 6 of the Complaint, the State admits that this case presents a federal question and that this Court has jurisdiction. The remainder of Paragraph 6 consists of legal argument and does not require a response.

7. In response to Paragraph 7 of the Complaint, the State admits that the Western District of Washington is a proper venue for this action.

III. PARTIES

8. In response to Paragraph 8 of the Complaint, the State admits that the Democratic Party meets the definition of "major political party" set forth in RCW 29A.04.086. The State does not have knowledge sufficient to admit or deny the remaining allegations in Paragraph 8, and therefore denies them.

9 In response to Paragraph 9 of the Complaint, the State lacks sufficient knowledge to admit or deny the allegations contained therein, but has no reason to doubt the truth of those allegations.

10. In response to Paragraph 10 of the Complaint, the State admits that this paragraph accurately names several county officers. These officers have powers and responsibilities as described in state law. The State further admits that all of the counties mentioned in Paragraph 15, except Spokane County, lie within the Western District of Washington.

IV. WASHINGTON'S ELECTION SYSTEM

11. Responding to Paragraph 11 of the Complaint, the State admits that a primary will occur in September 2005, and that it will include both "partisan offices" and nonpartisan offices as defined by I-872. Initiative 872 defines "partisan office" as "a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name." I-872, § 4. The initiative measure further provides that for partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots. I-872, § 7(3). The initiative further states that "any party or independent preferences are shown for the information of voters only and may in no way limit the options available to voters." *Id.* When a primary is conducted for a partisan office, the top two candidates will be certified as qualified to appear on the general election ballot, unless only one candidate qualifies. I-872, § 7(2). To the extent that Paragraph 11 of the Complaint cites Washington statutes that are

inconsistent with I-872, the State asserts that these statutes have been superseded or impliedly amended by I-872. The State specifically asserts that its primary is not used to nominate or select the candidates of any political party for public office. Washington law neither requires political parties to nominate candidates for office, nor prevents them from doing so if they choose. The State has no specific knowledge as to whether defendants Logan and Terwilliger have made the assertions ascribed to them in Paragraph 11, but has no reason to doubt the accuracy of the allegation. However, the State asserts that the quotation is misleading taken out of context.

12. In response to Paragraph 12, the State denies that state law, including I-872, interferes or seriously burdens the rights of political parties and their adherents to exercise their rights of association. State law does not force any political party to participate in state elections, including primaries. The State denies that permitting candidates to list a party preference on the primary ballot constitutes an "association" between the candidate and a political party or, if it does, that such an "association" constitutes any cognizable burden on the associational rights of the parties. The State denies that state law allows any person to appropriate a political party's name. To the extent this answer does not otherwise fully respond to the allegations in Paragraph 12, they are denied.

13. Paragraph 13 of the Complaint consists entirely of legal argument concerning the alleged legal effect of state law. To the extent an answer is required, the State denies that Paragraph 13 accurately states the law.

14. In response to Paragraph 14 of the Complaint, the State asserts that the Washington state primary as established in I-872 does not select "standard-bearers" or party nominees. The remainder of the allegations, which constitute legal argument concerning the effect of the initiative measure and other laws and the purposes behind its enactment, are denied.

15. The allegations contained in Paragraph 15 of the Complaint consist of legal argument. To the extent they require answer, they are denied.

16. The State denies the allegations contained in Paragraph 16 of the Complaint. Since Washington does not conduct a primary in which party nominees are selected, these allegations are not material.

V. ALLEGATIONS CONCERNING DENIAL OF EQUAL PROTECTION

17. In response to Paragraph 17 of the Complaint, the State asserts that Washington law no longer makes party nomination a part of the state's electoral process, although political parties may endorse candidates for any office. To the extent that RCW 29A.20.121 provided that minor party candidates would be placed on the general election

ballot by virtue of nomination by convention, it has been superseded by Initiative 872 and is no longer operable. The State denies that its laws invade the associational rights of any political party, or that its laws deny the Democratic Party Plaintiffs the equal protection of the law.

18. In response to Paragraph 18 of the Complaint, this Paragraph cites statutes that have been superseded or rendered inoperable by the enactment of I-872. The State denies that its election system denies to any political party the right to nominate its candidates, or to enforce any legally cognizable rights concerning use of a political party's name. As amended by I-872, state law draws no constitutionally significant distinctions between major and minor parties.

VI. DEMOCRATIC PARTY OF WASHINGTON v. REED

19. Responding to Paragraph 24 of the Complaint, the State admits that the case of *Democratic Party v. Reed* was litigated, and resulted in a court declaration that a previous state primary system was unconstitutional. The State denies any remaining allegations in Paragraph 19.

20. Paragraph 20 of the Complaint consists of selected quotes from case law and of legal argument. The State admits that the quotations are accurate, though taken out of context. The State denies the remaining allegations in Paragraph 20.

21. Paragraph 21 of the Complaint consists of legal argument to the effect that I-872 establishes an election system that has the same constitutional defects as the system invalidated in *Democratic Party v. Reed*. To the extent an answer is required, the State denies that its laws are unconstitutional.

VII. ALLEGATIONS CONCERNING DEPRIVATIONS OF CIVIL RIGHTS

22. Responding to the allegations in Paragraph 22 of the Complaint, the State admits that the Washington State Democratic Central Committee has adopted rules governing the nomination of its candidates for public office and that those rules have been provided to various parties, including the county auditors.

23. The allegations contained in Paragraph 23 of the Complaint are legal argument. To the extent they require an answer, the State denies them.

24 The State denies the allegations contained in Paragraph 24 of the Complaint.

VIII. PLAINTIFFS' FIRST CAUSE OF ACTION

25. The State realleges and incorporates by reference Paragraphs 1 through 24 above.

26. Responding to Paragraph 26 of the Complaint, the State admits that there is a disagreement between the Plaintiffs and the State concerning the constitutionality of state election laws, but denies that the Plaintiffs have stated any cognizable claim for relief.

27. The State denies the allegations in Paragraph 27 of the Complaint.

28. The State denies the allegations in Paragraph 28 of the Complaint.

29. Responding to Paragraph 29 of the Complaint, the State admits that I-872 has no specific severability clause, but denies that the absence of a severability clause would require the Court to void the entire enactment upon a finding that any portion is unconstitutional.

30. The State denies the allegations in Paragraph 30 of the Complaint.

IX. PLAINTIFFS' SECOND CAUSE OF ACTION

31. The State realleges and incorporates by reference Paragraphs 1 through 30 above.

32. The State denies the allegations in Paragraph 32 of the Complaint.

33. The State denies the allegations in Paragraph 33 of the Complaint.

X. PLAINTIFFS' THIRD CAUSE OF ACTION

34. The State realleges and incorporates by reference Paragraphs 1 through 33 above.

35. The State denies the allegations in Paragraph 35 of the Complaint.

36. The State denies the allegations in Paragraph 36 of the Complaint.

XI. PLAINTIFFS' FOURTH CAUSE OF ACTION

37. The State realleges and incorporates by reference Paragraphs 1 through 36 above.

38. The State denies the allegations in Paragraph 38 of the Complaint.

39. The State denies the allegations in Paragraph 39 of the Complaint.

40. The State denies the allegations in Paragraph 40 of the Complaint.

41. The State denies the allegations in Paragraph 41 of the Complaint.

42. All allegations in the Complaint not specifically admitted above are denied.

XII. STATE'S DEFENSE

1. The Complaint fails to state a claim on which relief can be granted.

XIII. PRAYER FOR RELIEF

The State Intervenor Defendants respectfully requests the Court to enter judgment as follows:

1. Dismissing the Complaint for failure to state a claim on which relief can be granted.

2. Declaring that Washington's election laws, and the conduct of elections under those laws, do not deprive the Plaintiffs of any legally cognizable constitutional or other rights protected by either the Constitution and laws of the United States or of the state of Washington.

3. Denying the declaratory and injunctive relief requested by the Plaintiffs or by Plaintiff Intervenors.

4. Granting the State its reasonable fees and costs to the extent permitted by law.

5. Granting such other relief as the Court may deem appropriate.

DATED this 7th day of July, 2005.

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The Honorable THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, CHRISTOPHER VANCE, BERTABELLE HUBKA, STEVE NEIGHBORS, BRENT BOGER, MARCY COLLINS, MICHAEL YOUNG, Plaintiffs, v. DEAN LOGAN, King County Records & Elections Division Manager; BOB TERWILLIGER, Snohomish County Auditor; VICKY DALTON, Spokane County Auditor, GREG KIMSEY, Clark County Auditor, CHRISTINA SWANSON, Cowlitz County Auditor, VERN SPATZ, Grays Harbor County Auditor, PAT GARDNER, Pacific County Auditor, DIANE L. TISCHER, Wahkiakum County Auditor, and DONNA M. ELDRIDGE, Jefferson County Auditor, Defendants	NO. 05-0927 Z STATE INTERVENORS' ANSWER TO COMPLAINT IN INTERVENTION OF LIBERTARIAN PARTY

As and for an Answer to the Complaint in Intervention filed in this matter by the Libertarian

Party of Washington State (LP), the State Intervenors admit, deny, and allege as follows:

PARTIES

1. In Response to Paragraph 1 of the Complaint, the State has no specific knowledge as to the history of the Libertarian Party or the purposes for which it was organized, but has no specific basis to contest the accuracy of these allegations.

2.-3. Responding to Paragraphs 2 and 3 of the Complaint, the State has no knowledge as to the truth of the allegations contained therein, but has no basis to contest the accuracy of these allegations.

4. Responding to Paragraph 4 of the Complaint, the State admits this paragraph accurately names a number of county officers, who have duties as prescribed in state law. The State further admits that each of the officers in questions resides in the Western District of Washington, except Vicky Dalton, who resides in the Eastern District of Washington.

JURISDICTION AND VENUE

5. In response to Paragraph 5 of the Complaint, the State admits that this case presents a federal question and that this Court has jurisdiction.

6. In response to Paragraph 6 of the Complaint, the State admits that the Western District of Washington is a proper venue for this action.

FACTUAL ALLEGATIONS

7. Paragraph 7 consists of legal argument concerning the asserted constitutional rights of

political parties. The State denies that Paragraph 7 is an accurate summary of the state of the law.

8. In response to Paragraph 8, the State admits that Initiative 872 (I-872) was enacted, and that the text of the initiative is a matter of official record. The State denies the remaining allegations in Paragraph 8.

9. In response to Paragraph 9 of the Complaint, the provisions of I-872 are matters of official record and need not be the subject of factual pleadings. The State admits that I-872 establishes a system in which qualification for the general election ballot is not based on the political party affiliation or preference of the candidates. The remaining allegations in Paragraph 9 are denied.

10. Responding to Paragraph 10, the State admits that Paragraph 10 includes a short quote from the voters' pamphlet, taken out of context, but denies that the quote is material to this controversy. The remaining allegations in Paragraph 10 are denied.

11. Paragraph 11 consists of legal argument. The State denies that Paragraph 10 is an accurate statement of the law.

12. Paragraph 12 consists of legal argument. The State denies that Paragraph 12 is an accurate statement of the law.

13. Paragraph 13 consists of legal argument. The State denies that Paragraph 13 is an accurate statement of the law.

14. Paragraph 14 consists of legal argument. The State denies that Paragraph 14 is an accurate state of the law.

15. In response to Paragraph 15, the State admits that the LP nominated candidates for office by convention in some historical periods. The State admits that the Secretary of State has adopted rules implementing I-872 and that the contents of the rules are matters of official record. The State denies the remaining allegations in Paragraph 15.

16. In response to Paragraph 16, the State admits that I-872 contains language repealing certain earlier statutes. The State further asserts that any previous statutes, expressly repealed or not, that are inconsistent with I-872, have been impliedly repealed or amended by the Initiative. The remaining allegations of Paragraph 16 are denied.

17. Paragraph 17 consists of legal argument. The State denies that Paragraph 17 accurately states the law.

18. Paragraph 18 consists of legal argument. The State denies that Paragraph 18 accurately states the law.

19. Paragraph 19 consists of legal argument. The State denies that Paragraph 19 accurately states the law.

20. Responding to Paragraph 20, the State has no knowledge as to whether the term "Libertarian Party" is trademarked and therefore denies this allegation. The remaining allegations consist of legal argument. The State denies that they accurately state the law.

21. Paragraph 21 consists of legal argument. The State denies that Paragraph 21 accurately states the law.

22. Responding to Paragraph 22, the State has no specific knowledge as to the contents of rules adopted by the LP. The State denies that State law involves "affiliations" between parties and candidates for office, other than affiliations created by the parties, and further denies any remaining allegations in Paragraph 22.

23. Paragraph 23 consists of legal argument. The State denies that Paragraph 23 accurately states the law.

24. Paragraph 24 consists of legal argument. The State denies that Paragraph 24 accurately states the law.

25. Paragraph 25 consists of legal argument and speculation about hypothetical situations. The State denies that the Secretary of State has ever taken a position concerning the hypothetical election set forth in Paragraph 25. The remaining allegations are likewise denied.

26. Paragraph 26 consists of legal argument. The State denies that Paragraph 26 accurately states the law.

27. Paragraph 27 consists of legal argument. The State denies that Paragraph 27 accurately states the law.

FIRST CAUSE OF ACTION: DECLARATORY JUDGMENT

28. The State realleges and incorporates by references Paragraph 1 through 27.

29. Responding to Paragraph 29, the State admits that there is a controversy between the parties concerning the constitutionality of Washington's election system. The State denies that its election system is unconstitutional.

30. The State denies the allegations in Paragraph 30.

31. Responding to Paragraph 31, the State alleges that RCW 29A.20.110 through .201 were impliedly repealed by the enactment of I-872, except to the extent the older statutes can be implemented in harmony with the Initiative. The State further alleges that the Secretary of State has authority to implement the Initiative through rules. The remaining allegations in Paragraph 31 are denied.

32. Responding to Paragraph 32, the State admits that the LP is entitled to nominates its standard bearers through conventions if the Party so chooses. The State denies that state or county officials have ever interfered, or threatened to interfere, with the party convention process. Any remaining allegations are denied.

33. The State denies the allegations in Paragraph 33.

34. The State denies the allegations in Paragraph 34.

35. The State denies the allegations in Paragraph 35.

36. The State denies the allegations in Paragraph 36.

SECOND CAUSE OF ACTION: INJUNCTIVE RELIEF

37. The State realleges and incorporates by reference Paragraphs 1 through 36 above.

38. The State denies the allegations in Paragraph 38.

39. The State denies the allegations in Paragraph 39.

40. The State denies the allegations in Paragraph 40.

41. The State denies the allegations in Paragraph 41.

STATE'S DEFENSE

1. The Complaint fails to state a claim on which relief can be granted.

PRAYER FOR RELIEF

The State Intervenor Defendants respectfully request the Court to enter judgment as follows:

1. Dismissing the Complaint for failure to state a claim on which relief can be granted.

2. Declaring that Washington's election laws, and the conduct of elections under those laws, do not deprive the Plaintiffs of any legally cognizable constitutional or other rights protected by either the

Constitution and laws of the United States or of the state of Washington.

3. Denying the declaratory and injunctive relief requested by the Plaintiffs or by Plaintiff Intervenors.

4. Granting the State its reasonable fees and costs to the extent permitted by law.

5. Granting such other relief as the Court may deem appropriate.

DATED this 7th day of July, 2005.

ROB MCKENNA
Attorney General

MAUREEN A. HART, WSBA #7831
Solicitor General

James K. Pharris

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The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Intervenors, LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Intervenors, v. DEAN LOGAN, King County Records & Elections Division Manager, et al., STATE OF WASHINGTON, et al., Defendant Intervenors WASHINGTON STATE GRANGE, Defendant Intervenors.	No. C05-0927-Z STIPULATION AND AGREED ORDER OF SUBSTITUTION AND DISMISSAL **Noted for Consideration:** **Date of filing pursuant to Local Rule 7(d)(1)**

STIPULATION

COME NOW the parties in this matter, Washington State Republican Party, et al., plaintiffs, and Dean Logan, et al., defendants, by and through

their counsel of record, and agree and stipulate as follows:

1. This matter came on before the Honorable Senior District Court Judge Thomas Zilly on June 7, 2005, for a status conference at which the Court made numerous oral rulings regarding the orderly and efficient resolution of this matter.

2. One of those oral rulings, now reduced to a written ruling allowing the State of Washington to intervene (dkt. #30), has made it unnecessary for the individual auditor defendants to remain parties to this action.

3. The individual auditor defendants signing below rely on the State of Washington to defend this action in all respects, and agree to be bound by this Court's ruling with respect to the matters at issue. The State of Washington has agreed to be substituted for the auditor defendants as though it were the original defendant, for all purposes.

4. Said individual auditor defendants are no longer necessary to this action, and should be dismissed with prejudice and without costs.

5. This Court has the authority and discretion to grant this stipulated order pursuant to *inter alia*, Fed. R. Civ. P. 16.

ORDER

THIS MATTER having come on duly and regularly before the undersigned Judge of the above-entitled Court, the parties having reached an agreement and stipulation as set forth above, and

the Court being fully apprised of the premises, NOW THEREFORE,

IT IS HEREBY ORDERED the individual auditor defendants signing below rely on the State of Washington to defend this action in all respects and agree to be bound by the Court's ruling with respect to the matters at issue. Said defendants are no longer necessary to this action and are dismissed with prejudice and without costs. The State of Washington shall be substituted for the auditor defendants as though it were the original defendant, for all purposes. This Court has the authority and discretion to grant this stipulated order pursuant to, *inter alia*, Fed. R. Civ. P. 16.

THE CLERK shall adjust the CM/ECF Docket Sheet accordingly, and give notice of this Stipulation and Agreed Order to all counsel of record.

DONE IN OPEN COURT this 13th day of July, 2005.

Thomas S. Zilly

Judge Thomas Zilly

Approved:

PLAINTIFFS:

By approved via email
John J. White, Jr. WSBA #13682
Kevin B. Hansen, WSBA #28349
Attorneys for Plaintiffs

PLAINTIFFS IN INTERVENTION:

By ____approved via email
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Jay Carlson, WSBA #304111
Attorneys for Plaintiffs in Intervention, Washington State Democratic Party and Paul R. Berendt, Chair

By____approved via email
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

and

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

and

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff Intervenors,

v.

DEAN LOGAN, King County Records & Elections Division Manager, et al.,

Defendants,

STATE OF WASHINGTON,

Defendant Intervenors

and

WASHINGTON STATE GRANGE,

Defendant Intervenors.

No. C05-0927Z

ORDER

[Clarifying Previous Order]

Plaintiff Republican Party sought a status conference by letter dated August 8, 2005. *See*

Letter from John J. White, docket no. 105. The Republican Party sought clarification of the status of two claims in light of this Court's Order on Summary Judgment, docket no. 87, and Permanent Injunction, docket no. 94. First, Plaintiff asks the Court to consider its challenge to Wash. Rev. Code § 29A.24.031, the filing statute under the "Montana" primary. Second, Plaintiff asks the Court to address its challenge "on equal protection grounds, of protections under state law granted to minor parties with regard to the use of their name by candidates not authorized by the minor party to use the name." *See* Letter, docket no. 105.

Pursuant to the Plaintiff Republican Party's request, the Court held a telephone status conference, on the record, on Friday, August 12, 2005. After considering the argument of counsel and being fully advised, the Court enters the following Order:

(1) The Court CLARIFIES its Order on Summary Judgment, docket no. 87. That Order did not decide whether the "Montana" primary filing statute, Wash. Rev. Code § 29A.24.031, was unconstitutional as part of the "Montana" primary system. That issue was not properly raised by the parties in connection with the stipulated legal issues agreed to by the parties for expedited briefing. *See* Stipulated Statement of Legal Issues, docket no. 40. In addition, the issue was not clearly identified by the Supplemental Motion for Summary Judgment filed by the Plaintiff Republican Party. *See* Republican Supplement, docket no. 63.

(2) The Court's Order on Summary Judgment "[did] not reach the equal protection argument raised by the Republican Party" because the Court found Initiative 872 unconstitutional on other grounds. *See* Order, docket no. 87, at 34.

(3) The Court concludes in the interest of justice this action should be and hereby is STAYED in light of the pending appeals to the Ninth Circuit. See Notices of Appeal, docket nos. 95, 97; *see also Marathon Oil Co. v. United States*, 807 F.2d 759, 764-65 (9th cir. 1986).

(4) The Court further STAYS consideration of any motion for attorneys' fees until further Order by the Court.

IT IS SO ORDERED.

Dated this 12th day of August, 2005.

Thomas S. Zilly

Thomas S. Zilly
United States District Judge

Supreme Court, U.S.
FILED
MAY 21 2007

NO. 06-713 and NO. 06-730

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE GRANGE,
Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON STATE; ET AL.,
Respondents.

STATE OF WASHINGTON, ET AL.,
Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON STATE; ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER WASHINGTON STATE GRANGE

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QUESTION PRESENTED FOR REVIEW

In *California Democratic Party v. Jones*, 530 U.S. 567, 585-586 (2000), this Court specified how States could structure a top-two primary system that does not violate the associational rights of a political party. The State of Washington subsequently enacted a top-two primary statute that the Washington State Grange had specifically drafted to comply with this Court's ruling in *Jones*. As counsel of record for the lead Respondent in this case has explained, that statute "enacted a two-stage election with a 'winnowing' primary under which all candidates who file would appear on the ballot in the first stage, and a run-off between the top two in the second stage." JA 692. One clause in Washington's new statute also allows a person running for certain offices to disclose on the ballot the name of the party (if any) that he or she personally prefers.

The Ninth Circuit invalidated Washington's top-two statute in its entirety, holding that the First Amendment prohibits a State from allowing a person running for public office to disclose the name of the party he or she personally prefers on the ballot. This case accordingly presents the following question:

Does the First Amendment prohibit a State from allowing a person running for public office to disclose the name of the party he or she personally prefers on the ballot?

PARTIES TO THE NINTH CIRCUIT PROCEEDING WHOSE JUDGMENT IS UNDER REVIEW

Defendant Washington State Grange: The Washington State Grange is the Petitioner in case no. 06-713. The Grange is described at JA 675-77. It sponsored the voter-approved Initiative Measure that enacted the top-two statute at issue. The Grange was aligned as Defendant-Intervenor in the U.S. District Court and as Appellant in the Ninth Circuit Court of Appeals.

Co-Defendants of the Grange: The Grange's co-defendants are the Petitioners in the related case no. 06-730. They are the State of Washington, its Attorney General Rob McKenna, and its Secretary of State Sam Reed. They were aligned with the Grange as Defendant-Intervenors in the U.S. District Court and as Appellants in the Ninth Circuit Court of Appeals. The U.S. District Court also substituted the State for the County Auditors who were the initial defendants in the trial court.

Plaintiffs: The Washington State Republican Party and its officials Diane Tebelius, Bertabelle Hubka, Steve Neighbors, Mike Gaston, Marcy Collins, and Michael Young; Washington State Democratic Central Committee and its official Paul Berendt; Libertarian Party of Washington State and its officials Ruth Bennett and J.S. Mills, are the Respondents in both case nos. 06-713 & 06-730. They collectively were aligned as Plaintiffs and Plaintiff-Intervenors in the U.S. District Court and as Appellees in the Ninth Circuit Court of Appeals.

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RELIEF SOUGHT

The Washington State Grange respectfully seeks a reversal of the Ninth Circuit decision invalidating Washington's top-two election statute (Initiative 872).

OPINIONS & ORDERS BELOW

The Ninth Circuit's opinion is reported at 460 F.3d 1108 (Grange Pet. App. 1a-34a). Its others orders are unpublished (Grange Pet. App. 101a-111a).

The District Court's summary judgment and preliminary injunction opinion is reported at 377 F.Supp.2d 907 (Grange Pet. App. 35a-92a). Its permanent injunction order (Grange Pet. App. 97a-100a) and other orders (JA 139-40, 232-33, 821-28) are unpublished.

BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). This Court granted the Grange's Petition For A Writ Of Certiorari in this case no. 06-713 on February 26, 2007. The judgment of the Ninth Circuit was entered August 22, 2006. The District Court had federal question jurisdiction under 28 U.S.C. §§1331 & 1343.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

A. United States Constitution

The First Amendment of the United States Constitution provides:

> FREEDOM OF RELIGION, SPEECH, AND OF THE PRESS. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const., amend. I (Grange Pet. App. 112a).

The Fourteenth Amendment of the United States Constitution provides in part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

U.S. Const., amend. XIV, §1.

B. Washington State Constitution

The Article of the Washington State Constitution establishing the State's legislative branch provides in part:

> Legislative Powers, Where Vested. The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be

called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.

(a) Initiative: The first power reserved by the people is the initiative. Every such petition shall include the full text of the measure so proposed. .... Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. .....

(d) .... All elections on measures referred to the people of the state shall be had at the next succeeding regular general election following the filing of the measure with the secretary of state, except when the legislature shall order a special election. Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon: .... Such measure shall be in

> operation on and after the thirtieth day after the election at which it is approved. The style of all bills proposed by initiative petition shall be: "Be it enacted by the people of the State of Washington." ....

Wash. Const., art. II, §1 (Grange Pet. App. 113a-115a).

C. Washington's Prior Party-Nominating Statute ("Montana" system)

Immediately before Initiative 872, the State of Washington employed what is commonly called a "Montana" party-nominating system. It is set forth in full at JA 488-572.

Washington's version of that "Montana" system prints the candidates of different major parties on different ballots, and then places on the November general election the party's candidate who had received in the preceding primary "a plurality of the votes cast by voters affiliated with that party for candidates for that office affiliated with that party." Wash. Rev. Code 29A.36.191 in effect before I-872 (Grange Pet. App. 142a); see also. Wash. Rev. Code 29A.04.128 in effect before I-872 (Grange Pet. App. 141a) ("Primary. 'Primary' or 'primary election' means a statutory procedure for nominating candidates to public office at the polls.").

The corresponding declaration of candidacy accordingly had the person running for office declare him or her self as a candidate of a particular party:

> I ***am*** a ***candidate of*** the _____ party.

Wash. Admin. Code 434-215-012 in effect before I-872 (emphasis added) (Grange Pet. App. 129a, 131a, 134a).

D. Washington's Top-Two Statute (Initiative 872)

Initiative 872 ("I-872") replaced Washington's "Montana" system. The full text of Initiative 872 is set forth at Grange Pet. App. 116a-126a.

Initiative 872 changed Washington law to define "partisan office" as follows:

> "Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name.

I-872, §4 (Grange Pet. App. 117a-118a).

The previously-noted declaration of candidacy was accordingly changed to allow persons running for office to make the following public disclosure instead:

my party ***preference*** is _____.

Wash. Admin. Code 434-215-012 until federal court enjoined I-872 (emphasis added) (Grange Pet. App. 129a, 137a).

Initiative 872 then redefined "primary" as follows:

> "Primary" or "primary election" means a procedure for winnowing candidates for public office to a final list of two as part of a special or general election....

I-872, §5 (Grange Pet. App. 118a). And it specified a top-two runoff election as follows:

> For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes will appear first, and the candidate who received the next greatest number of votes will appear second.

I-872, §6(1) (Grange Pet. App. 118a-119a).

Under this top-two system, Washington's election regulations provided:

> Pursuant to Chapter 2, Laws of 2005 [Initiative I-872], a partisan primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election. The candidate who

> receives the highest number of votes and the candidate who receives the second highest number of votes at the primary election advance to the general election, regardless of the candidates' political party preference. .... Each voter may vote for any candidate listed on the ballot, regardless of the party preference of the candidates or the voter. ***Voters at the primary election are not choosing a political party's nominees.***

Wash. Admin. Code 434-262-012 until the federal court enjoined I-872 (emphasis added) (Grange Pet. App. 140a).

STATEMENT OF THE CASE

This case revolves around this Court's ruling in *Jones* and the changes in Washington State law after that ruling. The following summarizes that history.

A. Summer 2000: This Court Strikes Down California's Party-Nominating Primary In *Jones*.

This Court struck down California's blanket primary law in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*Jones*"). That law provided:

(1) A person could declare them self to be the candidate of any political party in the primary.

(2) Voters could vote for whomever they wanted in that primary.

(3) The State's general election ballot then designated as party nominee the person who had received the most primary votes among those persons who had declared themselves to be a candidate for that party's nomination.

Cal. Elec. Code §15451 (1996 version); *Jones*, 530 U.S. at 570.

This Court held that allowing people to self-declare themselves to be a candidate for a political party's nomination, and then allowing all voters to chose which one of those self-declared party candidates would be designated as that party's nominee on the general election ballot, violated that party's right to decide who would (and would not) be that party's nominee. 530 U.S. at 577-78.

The dissent argued that this Court's ruling would severely limit States' flexibility to adopt new types of primary systems in the future. 530 U.S. 600-01 (Stevens, J., dissenting).

This Court's majority opinion rejected the dissent's narrow reading of its *Jones* decision. This Court explained that States have broad latitude to allow all voters to vote for whomever they want in a State primary – just as long as State law does not designate the winner of that primary to be a party's nominee on the November election ballot. 530 U.S. at 572-73 & n.4.

To confirm that broad latitude, the *Jones* Court laid down a specific blueprint for how States can structure a top-two primary that is constitutional. That blueprint focused on the result specified by a State's primary law. And it confirmed

that a top-two primary is constitutional if it specifies the nonpartisan result of choosing the two most popular candidates overall instead of specifying the partisan result of choosing the nominee for a political party. As this Court's ruling explained:

> Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot – which may include nomination by established parties and voter petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. ***This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee.***

530 U.S. at 585-86 (emphasis added).

B. Fall 2003: Washington's Prior Party-Nominating Primary Is Struck Down In Reliance on *Jones*.

At the time of this Court's decision in *Jones*, Washington's primary law provided:

(1) A person could declare them self to be the candidate of any political party in the primary;

(2) Voters could vote for whomever they wanted in that primary;

(3) The State's general election ballot then designated as party nominee the person who had received the most primary votes among those persons who had declared themselves to be a candidate for that party's nomination.[1]

Since Washington's party-nominating law was similar to California's, Washington's law was stricken down in reliance on this Court's *Jones* ruling. *Reed*, 343 F.3d at 1203, 1207.

C. Spring 2004: Washington Adopts A "Montana" System In Response To *Jones*.

The Washington legislature responded by adopting the "Montana" system currently used in twelve States.[2] That "Montana" system provides:

---

[1] Wash. Rev. Code §29.30.095 & .020(3) (pre-2003 version) (the party designation on the ballot signified "the political party...of each candidate") and the Declaration Of Candidacy under that statute which provided that the listing of a party name designated that person as a ***"candidate of"*** that political party. Wash. Admin. Code 434-215-012 (pre-2003 version) (Grange Pet. App. 129a, 131a, 134a). See also *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1201 (9th Cir. 2003).

[2] Grange Pet. App. 9a-10a. Those twelve States' statutes are: **Mont**. Code Ann. §§13-10-209, -301 (2005); **Ga**. Code Ann. §21-2-224 (2006); **Haw**. Rev. Stat. §12-31 (2005); **Idaho** Code Ann. §34-904 (2006); **Mich**. Comp. Laws §§168.576, .570 (2006); **Minn**. Stat. §204D.08 (2006); **Mo**. Rev. Stat. §115.397 (2006); **N.D.** Cent. Code §16.1-11-22 (2005); **Vt**. Stat. Ann. tit. 17 §§2262, 2263 (2005); **Va**. Code Ann. §24.2-530 (2006); **Wis**. Stat. §§5.58, 5.62 (2005); **Wash**. Rev. Code §29A.52.151 (2006).

(1) A person can declare them self to be the candidate of any political party in the primary.

(2) Voters cannot vote for whomever they want in the primary. Instead, they have to choose between voting for the candidates of one party or the other.

(3) The State's general election ballot then designates as party nominee the person who had received the most primary votes among those persons who had declared themselves to be a candidate for that party's nomination.

Wash. Rev. Code 29A.36.191 and 29A.04.128 in effect immediately before I-872 (Grange Pet. App. 142a & 141a); Wash. Admin. Code 434-215-012 in effect immediately before I-872 (Grange Pet. App. 129a, 131a, 134a).

D. Fall 2004: Washington Voters Replace The "Montana" System With A Top-Two System In Reliance On *Jones* (Initiative 872).

Washington voters used the Montana system for the first time in the September 2004 primary.

They did not like it. Two months later those same voters voted 60%-40% to replace the Montana statute with a top-two statute (Initiative 872). Grange Pet. App. 10a.

Washington's voters enacted this top-two statute pursuant to the legislative authority that they had expressly reserved to themselves in

Article II, section 1 of their State Constitution. (The relevant text of Washington's Constitution is set forth above at pages 2-4.)

As the Ninth Circuit acknowledged, Washington's new top-two primary law was designed to comply with this Court's ruling in *Jones*. Grange Pet. App. 110a-111a. As the following pages explain in more detail, Washington's new top-two law accordingly provided as follows:

(1) The declaration of candidacy for the primary was changed so a person could no longer declare them self to be the candidate of any political party.

(2) Voters would be allowed to vote for whomever they want in the primary.

(3) The State's general election ballot no longer designated any person as any party's nominee. Instead, that ballot designated the primary's top two vote getters.

As the following pages also confirm, the difference between Washington's top-two statute and the constitutional top-two statute described in *Jones* was the piece of Washington's statute that allows a person running for certain offices to disclose on the ballot the name of the political party (if any) which he or she personally prefers.

More specifically, Washington's new top-two statute provided that the top two vote getters in the State's primary advance to the November general election:

> Section 6(1): .... For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes will appear first, and the candidate who received the next greatest number of votes will appear second. (Grange Pet. App. 118a-119a.)

Another part of this top-two statute permitted persons running for certain offices to disclose on the ballot the name of the party (if any) which he or she personally prefers. Washington's new statute defined those offices as "partisan offices" to tie the statute's use of the term "partisan" to the type of office being voted on rather than the type of result produced by that vote:

> Section 4: .... "Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name. (Grange Pet. App. 117a-118a.)

The State election regulations in the Washington Administrative Code ("WAC") were accordingly amended to reflect this new statute's fundamental change in the meaning of the declaration of candidacy filed by a person running for public office.

As noted earlier, the declaration of candidacy under Washington's prior party-nominating statutes had the person running for office declare him or her self to be a ***candidate of*** a political party:[3]

> I am a ***candidate of*** the _____ party.

Given the nonpartisan result specified by Washington's new top-two statute, however, the State changed its filing declaration to instead allow each person running for office to make the following public disclosure instead:

> my party ***preference*** is _____.

Wash. Admin. Code 434-215-012 until federal court enjoined I-872 (emphasis added) (Grange Pet. App. 129a, 137a).

As noted earlier, Washington's new top-two statute tied its use of the term "partisan" to the type of office being voted on rather than the type of result that vote produced. Washington's top-two election regulations according confirmed with respect to the above declaration's "partisan" statement of personal party preference that:

> Pursuant to Chapter 2, Laws of 2005 [the new top-two statute], a partisan primary does not serve to determine the nominees of a political party but serves to winnow

[3] Wash. Admin. Code 434-215-012 under the State primary statutes in effect before I-872 (emphasis added) (Grange Pet. App. 129a, 131a, 134a).

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

Nos. 06-713 & 06-730

IN THE

Supreme Court of the United States

WASHINGTON STATE GRANGE,

Petitioner,

-and-

WASHINGTON, *et al.*,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT LIBERTARIAN PARTY OF WASHINGTON

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QUESTION PRESENTED

Is Washington State's partisan "top two" primary election system constitutional merely because the state asserts voters are not "choosing" a party's "nominee," even though I-872 determines which Libertarian candidates appear on the general election ballot, abandons this Court's ballot access jurisprudence by unreasonably restricting access to the general election ballot, unlawfully converts the trademarked Libertarian Party name to the state's own use, deprives the Libertarian Party of its First Amendment associational right to define the scope of its association, severely burdens the Libertarian Party's ability to financially support its duly nominated candidates, and serves no legitimate state interest?

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STATEMENT OF THE CASE

Washington State has always had a partisan election system.[1] In 2000 this Court declared that representative democracy is "*unimaginable*" without the involvement of political parties.[2] In 2003, after three legal challenges over several decades,[3] Washington's blanket primary system was held unconstitutional because it "prevents a party from picking its nominees."[4]

In response, Washington voters adopted Initiative 872 (hereinafter "I-872"), in which the sponsors attempted to "evade important constitutional restraints"[5] to return Washington to a blanket primary system. The Petitioner Washington State Grange (hereinafter the "Grange") suggests that it drafted I-872 to satisfy the description of a "*nonpartisan blanket primary*" discussed by this Court in *Jones*.[6] To the contrary, and according to the initiative itself, I-872 was expressly intended to become effective only if the

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1. A detailed history of primary election law in Washington State is set forth in Part V of *Washington State Republican Party v. Logan*, 377 F. Supp. 2d 907 (W.D. Wash. 2005), *see* Appendix to Washington's Petition for Certiorari, at 35a. (hereinafter Wash. App.).

2. *California Democratic Party v Jones*, 530 U.S. 567, 574 (2000) (hereinafter "*Jones*").

3. *Anderson v. Milliken*, 59 P.2d 295 (WA 1936), *Heavey v. Chapman*, 611 P.2d 1256 (WA 1980), *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. den.*, 540 U.S. 957, and *cert. den.*, 541 U.S. 957 (2004).

4. *Reed*, 343 F.3d at 1204.

5. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-834 (1995), and compare *Cook v. Gralike*, 531 U.S. 510, 522-523 (2001).

6. *Jones*, 530 U.S. at 585.

court decision invalidating the traditional blanket primary[7] became final.[8] According to campaign literature published by the Grange, the objective of I-872 was to "restore the kind of choice that the voters enjoyed for seventy years with the blanket primary"[9] and to "look nearly identical to the blanket primary system"[10] that had been invalidated.

In fact, I-872 omitted a crucial element of the "*nonpartisan blanket primary*" description, i.e., "nomination by established parties or voter-petition requirements for independent candidates."[11] Far from eliminating the previous state regulation of the party nominating process, as argued by Petitioner State of Washington (hereinafter "Washington")[12], I-872 delivers a fatal blow to the Respondent Libertarian Party of Washington State (hereinafter "Libertarian Party").

I-872 did not return political parties to the status quo ante to adoption of the Australian ballot. The government still prints all ballots and determines what names are to appear on them. Inconsistent with the model "*nonpartisan blanket primary*" discussed in *Jones*[13] and established ballot access

7. *Reed, supra.*

8. Initiative 872 § 18, JA - 420.

9. Voter's Pamphlet Statement For Initiative 872, JA – 407, and, *compare*, Initiative 872, § 3, JA - 411, with Wash. Rev. Code § 29.18.200 (2003).

10. "Yes On 872" website home page. *See* http://www.blanket primary.org/ (Last visited 7/30/07).

11. *Jones*, 530 U.S. at 585.

12. Washington's opening brief on the merits, at 16 (hereinafter "Wash. Br.").

13. *Jones*, 530 U.S. at 585.

law, I-872 ignores the results of any political party nominations. Instead, it allows any candidate to assert a "preference" for any political party, regardless whether the party approves of the candidate or even whether the candidate is a party member.[14]

In addition, I-872 converts the trademarked Libertarian Party name to Washington's own use, offering the Libertarian name to any candidate, without any opportunity for the Libertarian Party to participate or object.[15] Every person wishing to be a candidate for partisan office has the opportunity, at the candidate's exclusive option, to disperse and/or dilute voter support for duly nominated candidates of the Libertarian Party. Any citizen wishing to vote for (or oppose) Libertarian Party nominees has no assurance, without resorting to collateral information not provided by the government, how the election related messages of the candidates "preferring" the Libertarian Party are in any way related to the Libertarian Party or its message.

Finally, I-872's "top two" primary scheme eliminates all meaningful opportunities for a Libertarian Party candidate, or any other third party or independent candidate, to reach the general election ballot. The disadvantages of third party and independent candidates in certain election systems are well known.[16] Professor Duverger has shown that voters in single-member district systems who are fearful of casting a "wasted vote" tend to vote for parties and/or candidates having a realistic chance of winning, even if another party

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14. Initiative 872 § 7, JA 413-414.

15. *Id.*

16. *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 357 (2004) (Breyer, J. dissenting).

or candidate more closely represents the voter's political views, thus perpetuating the dominance of two strong political parties.[17]

I-872 replaced the so-called "modicum of support" test with a "top two" test for access to the general election ballot,[18] effectively institutionalizing a two-party system that assures Libertarian Party candidates will never make it to the general election ballot except in the most unusual of circumstances. The sponsors of I-872 admitted in their campaign literature that Libertarian Party candidates were "more likely" under I-872 to avoid federal and statewide offices, and that their only chance to access the general election ballot was in smaller districts dominated by one major party.[19]

Professor Schattschneider taught, "The nature of the nominating procedure determines the nature of the party; he who can make the nomination is owner of the party."[20] Since I-872 uses an Australian ballot in which only two candidates advance to the general election in a single member district the way remains "opened toward regulation of the entire nominating process."[21] Washington still "makes" the

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17. Duverger, Maurice, "Factors in a Two-Party and Multiparty System," in *Party Politics and Pressure Groups*, (New York: Thomas Y. Crowell, 1972), pp. 23-32.

18. When Libertarian Party candidates participated in the now invalid blanket primary they needed only to obtain 1% of the total vote to move to the general election ballot. *See Munro v Socialist Worker's Party*, 479 U.S. 189 (1986).

19. JA – 80.

20. E.E. Schattschneider, *Party Government* 64 (1942).

21. Wash. Br. at 6 (citing to Merriam & Overacker, *Primary Elections*, 24 (1928)).

nomination procedure and I-872 "owns" the future of the Libertarian Party. I-872 will unquestionably "dictate electoral outcomes, [and] . . . favor or disfavor a class of candidates."[22]

In sum, I-872 not only allows renegade and imposter candidates to dilute or corrupt the Libertarian Party's message as well as to disperse voter support for the duly nominated Libertarian Party candidate in the primary election; it also forces the Libertarian Party to radically alter its primary election behavior. Indeed, it forces supporters of the Libertarian Party in strong two-party districts to search for reasons to remain organized.

On May 19, 2005 the Libertarian Party and some of its adherents sought leave to intervene in a suit brought by the Washington State Republican Party. The Libertarian Party claimed that I-872 places impermissible limits on access to the general election ballot contrary to the U. S. Constitution, and allows a person to appropriate the Libertarian Party label without compliance with its nominating rules and without allowing the Party to define what the Party label means.[23] The district court and the Ninth Circuit both determined that political parties' rights of association were severely burdened and declared I-872 unconstitutional in its entirety.[24] Neither the district court nor the Ninth Circuit reached the other issues raised by the Libertarian Party.[25]

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22. *Thornton*, 514 U.S. at 833-834.

23. JA 44-60.

24. *Washington State Republican Party v Washington*, 460 F.3d 1108 (2006), *see* Wash. App. at 1a; and *Logan*, *supra*, *see* Wash. App. at 35a.

25. Wash. App. 33a, 84a.

Apparently blind to I-872's lethal attack upon the Libertarian Party, Washington and the Grange appeal to this court to reverse the Ninth Circuit. Washington argues generally that I-872 is authorized by the "*nonpartisan blanket primary*" dictum in *Jones*, and that the burdens suffered by the political parties are not severe enough to warrant this Court's strict scrutiny. The Grange argues basically that the voter and candidate rights involved outweigh political party rights. Both are wrong.

For the following reasons, this Court should affirm the Ninth Circuit.

SUMMARY OF ARGUMENT

Washington State's partisan "top two" primary election system imposes overly restrictive requirements for access to the general election ballot. It is not the primary at which candidates are elected to public office; but rather, the general election. Yet I-872 allows access to the general election ballot through one route only, replacing the traditional "modicum of support" ballot access test adopted by this Court with an outcome directed popularity contest that will insulate the two major parties from any competition from third party or independent candidates on the general election ballot. The candidate "winnowing" system favors candidates who appeal to the political center of the electorate while it suppresses the speaker's autonomy rights of third party and independent candidates. [26]

The system imposes an additional burden on the Libertarian party because the Libertarian Party name is a

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26. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

federally registered trademark. Through I-872 Washington unlawfully converts the Libertarian Party name to the state's own use, for the state's own purpose, without the permission or participation of the Libertarian Party. Even though it allows candidates to use party names on the ballot, it deprives candidates of the opportunity appear on the ballot as party nominees and deprives voters of the opportunity to vote for a party's nominee regardless of the name of the candidate. Finally, I-872 effectively prevents the Libertarian Party from being classified as a "major party" or even as a "*bona fide* political party" under Washington's campaign finance laws. In consequence the Libertarian Party is subject to far more stringent campaign contribution limits than which apply to Washington's major parties.

Petitioners have shown no legitimate state interest that supports this new system. Contrary to the arguments of petitioners, the rights of voters and candidates are not enhanced by I-872. Rather than assisting the people in directing their own self-government, I-872 deprives voters of the ability to rely on political parties or political party names, particularly in the long term—even though political science generally recognizes a political party is one of the few coordinating forces within the Madisonian system of checks and balances that make *any* government action possible.[27]

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27. *See, e.g.*, Schattschneider, E.E., *Party Government*, 1 (1942); Rossiter, C., *Parties and Politics in America* (1960); Aldrich, John *Why Parties?* 18 (1995).

ARGUMENT

I-872 VIOLATES THE LIBERTARIAN PARTY'S RIGHTS

Political parties play an essential role "in brokering group interests and solving voter's collective action problems. A polity without parties places a greater cognitive burden on individual voters and weakens the collective responsibility of political parties."[28] The cases decided by this Court "vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'"[29]

> Representative democracy in any populous unit of governance is *unimaginable* without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself.[30] (emphasis added)

I-872 creates the unimaginable.

I-872 DEPRIVES THE LIBERTARIAN PARTY OF REASONABLE BALLOT ACCESS

> For more than two decades, this Court has recognized the constitutional right of citizens to

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28. Persily and Cain, *Symposium: Law and Political Parties: The Legal Status of Political Parties: a Reassessment of Competing Paradigms*, 100 Colum. L. Rev. 775, 787 (2000).

29. *Jones*, 530 U.S. at 575.

30. *Jones*, 530 U.S. at 574.

> create and develop new political parties. The right derives from the First and Fourteenth Amendments and advances the constitutional interest of likeminded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences.[31]

This Court's recognition of political freedom and the right to politically associate reaches back to the formation of the United States.

> Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties.[32]

This Court has held that no ballot access regime may "operate to freeze the political status quo . . . [and all must recognize] . . . the potential fluidity of American political life."[33]

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31. *Norman v Reed*, 502 U.S. 279, 288 (U.S., 1992) (citing to *Anderson v. Celebrezze*, 460 U.S. 780, 793-794 (1983); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); and *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)).

32. *Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (1957).

33. *Jenness v. Fortson*, 403 U.S. 431, 438-439 (U.S. 1971).

Nonetheless, in one sweeping move I-872 abandons all of the general election ballot access jurisprudence developed by this Court; replacing it with a "winnowing" process that institutionalizes the two major parties.

Washington Cannot Require More Than A "Modicum Of Support" For Access To A Partisan General Election Ballot

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.[34]

No other state but Washington requires voter support of more than 2.05% of the electorate for a U.S. Senate and Governor candidate to access the general election ballot.[35] Data obtained from the Secretary of State regarding the *top four* candidates in primary elections for partisan statewide offices in Washington from 1998 to 2004 reveals a candidate is likely required to obtain 21% *or more* of the total vote in order to move to the general election ballot in a top-two system. Third place candidates, often Democratic or Republican Party candidates and not third party candidates, generally range between 4% and 21% of the total vote.[36] Ballot access expert Richard Winger showed by declaration dated July 5, 2005 that the average percentage of the total vote received by each second place candidate in any primary election for a federal

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34. *Rhodes*, 393 U.S. at 31 (1968).

35. JA – 353-356.

36. JA – 309-312.

or state office in Washington from 1992 to 2002 (during which the old blanket primary was still operative) was 32.43%.[37]

Mr. Winger also found over the same period *no minor party candidate ever finished first in any primary*, and except for the obvious cases in which only one major party candidate was running in that district, a *minor party candidate finished second only once*. In that contest a Reform Party candidate finished second behind a Democrat (who polled nearly 64% in the primary) and ahead of another Democrat and a Libertarian. No Republican candidate had entered the contest.[38]

Nothing in this Court's ballot access jurisprudence suggests that a state can require more than a "modicum of support" from voters for access to a partisan general election ballot, or that the quantity of support required for partisan general election ballot access may be determined by the results of a primary election.[39] *Storer v Brown* held that 5% of the electorate is as high a threshold as the U.S. Constitution will allow.[40] Any requirement in excess of 5% is likely to fail a constitutional challenge under the Elections Clause[41]

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37. JA – 751-761

38. *Id*. These results are consistent with Professor Duverger's prediction. *See* note 17, *supra*.

39. The fact that I-872 requires votes rather than signatures to demonstrate support is irrelevant. This Court was previously "unpersuaded, . . . , that the differences between the two mechanisms are of constitutional dimension." *Munro*, 479 U.S. at 197

40. *Storer v. Brown*, 415 U.S. 724, 739 (1974)

41. *Id*. And *see* further discussion at "Washington's Partisan "Top Two" Primary Violates the Elections Clause of the Constitution," *infra*.

or the Equal Protection Clause.[42] Nonetheless, I-872 implements a system requiring voter support well in excess of this constitutional maximum; the actual number and/or percentage of votes required for access to general election ballot in each contest being incapable of determination until after the primary takes place!

Washington Must Provide More Than One Route To A Partisan General Election Ballot

I-872 provides only one route to the *partisan* general election ballot, by winning or placing second in the primary.[43] None of the ballot access cases decided by this Court suggest that a state may provide only one route to a partisan general election ballot under any circumstance. To the contrary:

> The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. . . . Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams v Rhodes*."[44]

This observation applies equally to independent or unaffiliated candidates.

> "It may be that the 1% registration requirement is a valid condition to extending ballot position to a

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42. *Jenness*, supra, and *Rhodes*, *supra*.

43. Initiative-872, § 7(2), Wash. Br. 2.

44. *Jenness*, 403 U.S. at 442 (citing to *Rhodes*, 393 U.S. 23 (1968)).

> new political party. . . . But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." (citation omitted)[45]

The number and reasonableness of alternative routes to the general election ballot has been a major factor in the result of several ballot access cases.[46] *Burdick v. Takushi*[47] upheld Hawaii's elimination of write-in candidacies because Hawaii had three alternative and relatively easy routes to the ballot.[48]

By limiting the number of routes to the general election ballot to one only, and by limiting the number of partisan candidates who may appear on the general election ballot to two who by definition must show far more than a "modicum of support" to appear on the general election ballot, I-872 undermines the very same constitutionally protected rights that *Williams v. Rhodes*, *Jenness v. Fortson*, and their progeny have recognized and protected. Rather, it guarantees that only candidates who perform well in a de facto two party system will populate general election ballots.[49]

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45. *Storer*, 415 U.S. at 745 (U.S., 1974) (cited with approval in *McCarthy v. Briscoe*, 429 U.S. 1317, 1320 (U.S. 1976)).

46. *See, e.g., Jenness*, supra, *Storer*, supra, *Am. Party of Tex. v White*, 416 U.S. 767 (1974), and *Briscoe*, supra.

47. 504 U.S. 428 (1992).

48. Initiative-872 does not address the "write-in candidate" statute, Wash. Rev. Code § 29A.24.311. However, Washington's position that I-872 "impliedly repealed" the minor party nominating statutes probably means the write-in statute was also repealed.

49. *See* note 17, *supra*, and accompanying text.

I-872 UNLAWFULLY CONVERTS THE LIBERTARIAN PARTY NAME TO THE STATES' OWN USE

The name "Libertarian Party" is a registered trademark of the Libertarian National Committee that has been in use since 1972.[50] The Libertarian Party has had a presidential candidate on the Washington State ballot every four years since then, in addition to several other statewide and local contests, thus making it an established name identifying a specific organization. I-872 unlawfully authorizes Washington, and candidates authorized by Washington, to assume and exercise rights of ownership over personal property, in this case a trademarked organizational name, belonging to the Libertarian Party.

Washington argues the Libertarian Party is not entitled to trademark protection because a statement of "party preference" on an election ballot it is not a use "in commerce."[51] First, I-872 requires a candidate's "party preference" to appear not only on the ballot, but also in Washington's published voter's pamphlet.[52] Further, there is nothing within I-872 to prevent any candidate, who has thus been encouraged by Washington to declare a "party preference" for Washington's own purpose, from declaring and using that "party preference" in soliciting donations, preparing press releases, holding public meetings and press conferences, and otherwise engaging in the activities of a typical political campaign.

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50. JA – 346-351.

51. Wash. Br. at 47 (citing, *inter alia*, to 15 U.S.C. §§ 1114(1)(a), 1125(a)(1)).

52. Initiative-872 § 11, JA - 417.

The right to enjoin infringement of a trade or service mark "is as available to public service organizations as to merchants and manufacturers."[53] Retention of a distinct identity by a non-profit organization that sells no goods is just as important as it is to a commercial organization.[54] The Lanham Act has been applied to a wide variety of non-commercial public and civic situations,[55] and specifically to political organizations.[56] In *United We Stand Am., Inc.* the Second Circuit articulated sound policy reasons for including political organizations within the protection of the Lanham Act.

> A political organization that adopts a platform and endorses candidates under a trade name performs the valuable service of communicating to voters that it has determined that the election of those

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53. *N.A.A.C.P. v. N.A.A.C.P. Legal Defense and Educ. Fund*, 559 F. Supp. 1337, 1342 (D.D.C. 1983), *rev'd on other grounds*, 753 F.2d 131 (D.C. Cir.), *cert. denied*, 472 U.S. 1021(1985).

54. 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 9:5 (4th ed. 1996).

55. *See, e.g., United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86 (2d Cir. 1997) and the cases cited therein.

56. *See Brach Van Houten Holding, Inc. v. Save Brach's Coalition For Chicago*, 856 F. Supp. 472, 475-76 (N.D. Ill. 1994) (soliciting donations, preparing press releases, holding public meetings and press conferences, and organizing on behalf of its members' interests was performing "services" within the meaning of the Lanham Act); and *Committee for Idaho's High Desert v. Yost*, 881 F. Supp. 1457, 1470-71 (D. Idaho 1995), *aff'd* , 92 F.3d 814 (9th Cir. 1996)(non-profit organization engaged in dissemination of information about environmental causes via news releases, newsletters, and public advocacy entitled to Lanham Act protection even if it did not "place products into the stream of commerce.")

> candidates would be beneficial to the objectives of the organization. Thus voters who support those objectives can support the endorsed candidates with some confidence that doing so will advance the voters' objectives. If different organizations were permitted to employ the same trade name in endorsing candidates, voters would be unable to derive any significance from an endorsement, as they would not know whether the endorsement came from the organization whose objectives they shared or from another organization using the same name. Any group trading in political ideas would be free to distribute publicity statements, endorsements, and position papers in the name of the "Republican Party," the "Democratic Party," or any other. The resulting confusion would be catastrophic; voters would have no way of understanding the significance of an endorsement or position taken by parties of recognized major names. The suggestion that the performance of such functions is not within the scope of "services in commerce" seem to us to be not only wrong but extraordinarily impractical for the functioning of our political system.[57]

Washington's own common law also prohibits deceptive non-commercial uses of organizational names.[58] An instructive

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57. *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86 (2d Cir. 1997) (citing to *Tomei v. Finley*, 512 F. Supp. 695, 698 (N.D. Ill. 1981) (preliminary injunction issued because of strong likelihood of confusion resulting from political party's use of acronym designed to deceive voters into thinking the candidate was of the opposing political party))(footnotes omitted).

58. E.g., *Prince Hall Lodge v. Univ. Lodge*, 62 Wn.2d 28, 35 (1963).

1924 Washington Supreme Court decision involved Progressive Party presidential candidate Robert LaFollette.[59] In that year citizens of Washington organized the "LaFollette State Party" and nominated several candidates for public office, including Mr. LaFollette for the federal office of President, all without Mr. LaFollette's authorization and against his wishes. Members of the Progressive Party of Washington, which had also nominated Mr. LaFollette for President, sought a writ of mandate preventing the Secretary of State from placing the candidates nominated by the "LaFollette State Party" on the general election ballot. In authorizing a writ directing the Secretary to strike the word "LaFollette" and to show on the ballot instead that the "State Party" had made the disputed nominations the court said:

> Nothing so exclusively belongs to a man or is so personal and valuable to him as his name. His reputation and the character he has built up are inseparably connected with it. Others can have no right to use it without his express consent, and he has a right to go into any court at any time to enjoin or prohibit any unauthorized use of it. Nor is it necessary that it be alleged or proved that such unauthorized use will damage him.[60]

While *Hinkle* involved an individual's name, it clearly demonstrates the Washington Supreme Court places a significant value on the exclusive right of ownership to an established name beyond its use in commerce, including particularly within the realm of political speech.

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59. *State ex rel. LaFollette v. Hinkle*, 131 Wash. 86, 229 Pac. 317 (1924).

60. *Hinkle*, 131 Wash., at 93.

The very idea that any government could convert political party names to its own use was, prior to I-872, *unimaginable*. Nonetheless, relying on *Norman v. Reed*,[61] Washington apparently theorizes that if a State may not regulate a candidate's use of a political party's name then neither may a political party regulate the use of its own name. The Grange argues similarly; that the Ninth Circuit decision turned the primary election ballot into a "speech free zone."[62] *Norman* itself belies this astounding logic. This Court said that the ills of misrepresentation and/or electoral confusion caused by multiple uses of a political party name within a defined geographical area may be prevented "by requiring the candidates to get formal permission to use the name from the established party they seek to represent, . . ."[63]

I-872 SEVERELY BURDENS LIBERTARIAN PARTY ASSOCIATIONAL RIGHTS[64]

A fundamental rule of the First Amendment is that a speaker has the autonomy to choose the content of his own message.[65] Judicial deference should normally be given to association assertions regarding nature of their own expression and what would impair that expression.[66] Political parties have the right

61. 502 U.S. 279 (1991).

62. Washington State Grange opening brief on the merits, at 22-28 (hereinafter Grange Br.).

63. *Norman*, 502 US at 290.

64. The Libertarian Party generally agrees with the associational rights arguments made by its co-Respondents, Washington State Republican Party and Washington Democratic State Central Committee, although it would perhaps emphasize different points of those arguments. Nonetheless, to avoid unnecessary duplication the Libertarian Party will focus instead on aspects of this case that uniquely affect the Libertarian Party.

65. *Hurley, supra.*

66. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

to "identify the people who constitute the association, and to limit the association to those people only."[67]

According to its own Constitution, the purpose of the Libertarian Party is, inter alia, nominate and run candidates for public office.[68] It requires as part of its internal rules that "[a]ll Libertarian candidates for partisan office shall be members of the Libertarian Party. . . ."[69] One becomes a member of the Libertarian Party by subscribing to or affirming a non-aggression pledge.[70] Upon proper procedures, the Libertarian Party may expel its members.[71]

This pledge of "no first use" of force is thus a doctrinal prerequisite to membership within the Libertarian Party, and hence a prerequisite to represent the Libertarian Party in public elections. This requirement has no known parallel within the Democratic Party, the Republican Party or any other nationally recognized party. Because I-872 imposes no duty upon candidates to comply with the Libertarian Party's "no first use" requirements of all its candidates it poses exactly the kind risk that could "severely transform" the Libertarian Party.[72]

As more fully briefed by the Democratic Party and Republican Party respondents, I-872 prevents the Libertarian Party from identifying and limiting its membership, including

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67. *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981).

68. LPWA Const. Art. II, § 1; JA - 315.

69. LPWA Const. Art. XIII, § 1; JA - 325.

70. LPWA Const. Art. IV, § 1; JA - 316.

71. LPWA Const. Art. VI, § A(4); and Art. VIII, § B(2); JA – 319, 321.

72. *Jones*, 530 U.S. at 579.

particularly who may be a candidate of the party, by allowing any candidate to associate with the Libertarian Party merely by stating a "party preference" on the ballot. Even if this court were somehow to accept Washington's arguments and conclude the burdens placed upon the Democratic Party and the Republican Party by I-872 are something less than "severe", I-872 still severely burdens the Libertarian Party by destroying its ability to include in its message to voters the fact that ALL "Libertarian Party" candidates have affirmatively subscribed a "no first use" pledge.[73]

I-872 SEVERELY BURDENS THE LIBERTARIAN PARTY'S RIGHT TO FINANCIALLY SUPPORT IT'S NOMINEES

Washington law allows "major parties" and "*bona fide* political parties" to contribute more than 2.3 million dollars ($0.70 per state registered voter per cycle) to each of its candidates for statewide office.[74] A "major party" is one whose candidate receives 5% or more of the vote in a statewide general election.[75] In order for the Libertarian Party to become a "major party" under I-872 at least one statewide Libertarian Party candidate must earn perhaps 34% of a primary vote to even reach the general election.

If the district court correctly determined that I-872 "impliedly repealed" Washington's minor party nomination

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73. *Compare Ray v. Blair*, 343 U.S. 214 (1952) (parties may require candidate to execute pledge prior to certification as presidential elector).

74. Wash. Rev. Code § 42.17.640(4) As of July 27, 2007 Washington had 3,301,802 active registered voters. *See* http://www.secstate.wa.gov/elections/vrdb/pdf/Voter%20Registration%20Report%20(July%2027%202007).pdf (Last viewed July 28, 2007).

75. Wash. Rev. Code § 29A.04.086.

statutes,[76] I-872 also abolished the statute authorizing minor party "certificates of nomination".[77] A "certificate of nomination" is a statutory prerequisite to becoming a "*bona fide* political party" for campaign contribution purposes.[78] If the Libertarian Party is neither a "major party" nor a "*bona fide* political party", the most it can contribute to its statewide candidates is $1400.[79]

This is yet another example of how I-872 institutionalizes the two major parties, and impairs the First Amendment rights of Libertarians and other minor parties. Financing regulations are especially crucial in modern elections. The cost of a successful statewide campaign in Washington runs in the hundreds of thousands or millions of dollars.[80] A candidate's fundraising ability also has a direct effect on media coverage, which in turn influences voter preferences in both the primary and the general election.

Lubin v. Panish[81] invalidated on equal protection grounds filing fee statutes that required payment of a few hundred

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76. *Logan, supra*, Pet. App. 79a-84a.

77. Wash. Rev. Code § 29A.20.161.

78. Wash. Rev. Code § 42.17.020(6).

79. *Id.*

80. As of April 10, 2005, Washington's Secretary of State, Sam Reed, received and disbursed $651,319.93 in connection with his 2004 reelection campaign. *See* http://hera.pdc.wa.gov/wx/viewdoc_new.asp?strAppName=PDC&nZoomPercent=100&nDocId=788209&nQRSeq=4&nCurrentIndex=1&nPageNum=1&UseIrc=no As of June 29, 2005, Washington's Governor, Christine Gregoire, received and disbursed $6,364,683.93 in connection with her 2004 election campaign. *See* http://hera.pdc.wa.gov/wx/viewdoc_new.asp?strAppName=PDC&nZoomPercent=100&nDocId=808539&nQRSeq=6&nCurrentIndex=1&nPageNum=1&UseIrc=no (Last viewed July 26, 2007).

81. 415 U.S. 709 (1974).

dollars for ballot access, unless the state also had available a non-economic means of ensuring the "seriousness" of a candidate. Prior to I-872 Washington had allowed the Libertarian Party an opportunity to qualify as a "*bona fide* political party" and raise and spend funds at the same levels as the Democratic Party and Republican Party. If I-872 is upheld it is no longer possible for the Libertarian Party to become a "*bona fide* political party" and it can only become a "major party" if one of its candidates wins or places second in the primary.

The Equal Protection defect of I-872 in the campaign finance arena is that it deprives the Libertarian Party of that opportunity to raise funds in amounts comparable to those allowed to major parties. I-872 thus severely undermines the political viability of the Libertarian Party and its candidates, meanwhile insulating the major parties and their candidates from competition, regardless of the credentials or political views of the individual candidates.

I-872 IS NOT THE KIND OF "NONPARTISAN BLANKET PRIMARY" DISCUSSED IN JONES

Washington and the Grange argue strenuously that under I-872 "primary voters are not choosing a party's nominee," as if that fact proves I-872 is constitutional under this Court's holding in *Jones*.[82] They are wrong.

I-872 IS IN NO MEANINGFUL SENSE NON-PARTISAN

I-872 retains partisan labels for the use of all candidates regardless of the scope of their affiliation with the party. Washington attempts to downplay the significance of party

82. Wash Br. – 27.

labels on the ballot, calling them a "modicum of relevant information about the candidates"[83] However, I-872 remains fully partisan because it institutionalizes the two major parties in a "top two" primary that only major party candidates (or candidates stating a "party preference" for major parties) will win.[84] In addition, Washington campaign finance law makes partisan affiliation far more relevant to the Libertarian Party than mere candidate information.[85]

Moreover, Washington's co-petitioner Grange implicitly recognizes the substantive significance of a candidate's statement of "party preference" on the ballot, devoting two full sub-sections of its brief to advocating for the speech rights of candidates and railing against the Ninth Circuit for allegedly creating a "speech free zone" on the ballot.[86] In so arguing the Grange admits I-872 causes the very problem addressed by this Court in *Jones*, i.e., the ability to destroy a party by permitting candidates who do not share its core values to speak as if they were in support of or otherwise affiliated with that party.[87]

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83. Wash. Br – 24, 49.

84. *See* notes 17 and 35 – 38, *supra*, and accompanying text, and *see* "Washington's Partisan "Top Two" Primary Violates the Elections Clause of the Constitution," *infra*.

85. *See* "Initiative-872 Severely Burdens The Libertarian Party's Right To Financially Support It's Nominees," *supra*.

86. Grange Br. – 22-29, 39-43.

87. *Jones*, 530 U.S. at 581-582.

WASHINGTON'S PARTISAN "TOP TWO" PRIMARY VIOLATES THE ELECTIONS CLAUSE OF THE CONSTITUTION

The general power provided by the U.S. Constitution authorizing states to regulate the "time, place and manner"[88] of congressional elections does not authorize Washington to implement I-872. States may use primaries as limited qualifying mechanisms for candidates for the general election ballot,[89] but they must nonetheless confine their regulations within the boundaries of the U.S. Constitution.[90]

Even though states have a recognized interest in reducing crowded ballots and reducing voter confusion, this Court has allowed states only the right to use partisan primaries or conventions for major political parties[91] and a "modicum of support" test for all others[92] to limit the number of candidates appearing on the general election ballot. Contrary to this Court's sound ballot access guidance, I-872 invites ballot crowding and voter confusion at the primary election[93] and

88. U.S. Const. Art. I, § 4, cl. 1.

89. *Storer*, 415 U.S. at 739.

90. *Jones*, 530 S. Ct. at 573 (citing *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989), and *La Follette*, *supra*, (footnote omitted)).

91. *White*, 415 U.S. at 781 (U.S. 1974 (citing to *Storer*, 415 U.S. at 733-736 (1974)).

92. *Storer*, 415 U.S. at 739, and *see Lubin v. Panish*, 415 U.S. 709 (1974)(state may not require filing fees to discourage frivolous candidates).

93. *See* Initiative-872 § 9(3) (authorizing any person to become a candidate upon filing a declaration of candidacy), JA-415; and *see* "I-872 Deprives Voters Of The Right To Cast Their Votes Effectively," *infra*.

abandons the "modicum of support" test for access to the general election ballot.

> "It cannot be doubted that these comprehensive words ["time, place and manner"] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."[94]

However "broad" the Election Clause powers may be, no other provision in the U.S. Constitution gives states *any* regulatory authority over congressional elections.[95] Specifically, states do not have independent power to adopt their own qualifications for congressional service, and the power to add qualifications for the offices of congressman and senator is not part of the original powers of sovereignty that the Tenth Amendment reserved to the states.[96]

In fact, the purpose of the Elections Clause is "ensuring that elections are 'fair and honest,' and that 'some sort of order, rather than chaos, is to accompany the democratic

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94. *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

95. *Gralike*, 531 U.S. at 522-523.

96. *Thornton, supra.*

process.'"[97] "[T]he Framers understood the Elections Clause as a *grant of authority to issue procedural regulations*, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[98] (emphasis added)

But there is no evidence here or anywhere else to suggest that Washington's "top two" primary scheme ensures the integrity or orderliness of the election process any more than the system it replaced,[99] or that those interests informed its creation. Rather, I-872 abuses the regulatory power delegated by the Elections Clause in each of the three of the ways listed in *Thornton*.

First, the acknowledged objective of I-872—to "winnow" the number of candidates qualified for the general election to a specified number[100]—is plainly "outcome" directed. It ensures that two, and only two, "popular"[101] candidates appear on the general election ballot. "Unpopular" independent or third party candidates need not apply, even

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97. *Gralike*, 531 U.S. at 524, (citing to *Storer*, 415 U.S. at 730).

98. *Thornton*, 514 U.S. at 833-834.

99. When the blanket primary was invalidated the Washington legislature adopted and the governor partially vetoed a bill that resulted in an open primary private choice system similar to one used in Montana. JA - 425-579.

100. "Pursuant to Chapter 2, Laws of 2005 [Initiative I-872], a partisan primary does not serve to determine the nominees of a political party but serves to *winnow* the number of candidates to a final list of two for the general election." Wash. Admin. Code 434-262-012. *See also* Wash. Br. – 19, 20.

101. Grange Br. – 9, 15, 33.

though the general rule of speaker's autonomy forbids requiring candidates or political parties to appeal to a larger segment of the electorate.[102]

> History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.[103]

Second, I-872 favors candidates expressing a "preference" for political parties then in favor with the public—which everyone knows will be the Democratic Party and/or Republican Party, except perhaps in districts where one party is dominant[104]—and disfavoring candidates who "prefer" political parties out of favor with the public; all regardless whether the candidate has the support of the "preferred" party. Further, there is nothing in I-872 or the balance of Washington election law to prevent a candidate who has been *nominated* by the Libertarian Party from expressing a "party preference" for the Democratic Party or the Republican Party on the ballot. In short, I-872 damages the integrity of the election process by favoring glib, well-financed and telegenic candidates with a Machiavellian streak.

"The fundamental objectives of the freedoms of speech, press, petition, assembly and association were to assist the

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102. *Jones*, 530 U.S. at 583-584.

103. *Sweezy*, 354 U.S. at 251.

104. *See* note 19, *supra*, and accompanying text.

people in self government and to permit the people to thwart the abuse of power by their elected and appointed leaders."[105] But under I-872 rich and varied normative political discourse, including the voices of the poor, rejected and marginalized, which voices the First Amendment was created to protect, will rarely if ever make it to the general election.

Finally, and most alarming, the history of I-872 clearly demonstrates it was designed to evade constitutional restraints on blanket primary systems. Petitioners readily admit I-872 was created in contemplation of the *Jones* decision.[106] However, according to statements made by the Grange itself, I-872 was expressly intended (1) to become effective only if the court decision invalidating the traditional blanket primary[107] becomes final,[108] (2) to "restore the kind of choice that the voters enjoyed for seventy years with the blanket primary"[109] and (3) to "look nearly identical to the blanket primary system"[110] that had just been invalidated.

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105. *Brief of Amici Curiae Seeking Affirmance*, James MacGregor Burns, Barbara Burrell, William Crotty, James S. Fay, Roman B. Hedges, John S. Jackson, III, Everett C. Ladd, Kay Lawson, Gerald Pomper, political scientists, p. 7., *Tashjian v. Republican Party Of Connecticut*, 479 U.S. 208 (1986) (Docket # 85-766).

106. JA 173-174.

107. *Reed, supra.*

108. Initiative 872 § 18, JA - 420.

109. Voter's Pamphlet Statement For Initiative 872, JA – 407, and, *compare*, Initiative 872, § 3, JA - 411, with Wash. Rev. Code § 29.18.200 (2003).

110. "Yes On 872" website home page. *See* http://www.blanketprimary.org/ (Last visited 7/30/07).

A cursory reading of I-872 and its supporting literature reveals the obvious, if not explicitly stated, objective of I-872 was to severely weaken if not destroy all political parties in Washington. All of the Grange's campaign literature for I-872 reflects this anti-party bias. Washington implicitly recognizes this fact, by representing I-872 euphemistically to this court as "a major paradigm shift."[111]

Throughout more than two years of litigation in this case neither Washington nor the Grange has ever suggested that the integrity or orderliness of elections had any role whatsoever in the adoption of the "top two" scheme. In fact, the evidence demonstrates both legitimate state interests were, at best, forgotten or ignored.[112] I-872 is not a valid exercise of Washington's delegated power to regulate the "time, place and manner" of congressional elections.

I-872 DEPRIVES VOTERS OF THE RIGHT TO CAST THEIR VOTES EFFECTIVELY

Washington erroneously argues: "Initiative 872 provides easy access to the ballot, and facilitates the right of qualified voters to cast their votes effectively by allowing all qualified voters to participate in the primary election, without regard to political persuasion."[113] First, this Court has clearly stated easy access to the primary ballot discourages, confuses and frustrates voters.

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111. Wash. Br. – 19, 37.

112. Had either integrity or orderliness of elections been a factor at the drafting stage, I-872 would have explicitly addressed the minor party nominating statutes, which the district court wound up ruling had been "impliedly repealed," Wash. App. 81a-83a, as well as the statutes relating to campaign financing by minor political parties.

113. Wash. Br. – 30.

> A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process. . . . That "laundry list" ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion.[114]

Second, I-872 limits voter choice in the general election to two candidates only. The "top two" scheme prevents candidates who did not win or place in the primary but who may have shown at a close third from ever being on the general election ballot, despite the intervention of time and possibly crucial events.[115] This Court has already said that the right to vote is an equal protection right, and "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."[116]

"[A]bsent recourse to referendums, 'voters can assert their preferences only through candidates *or parties or both*.' By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences."[117]

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114. *Panish*, 415 U.S. at 715

115. For example, one or both of the prevailing candidates could die or be criminally indicted between the primary and general election.

116. *Rhodes*, 393 U.S. at 29, 31.

117. *Illinois Elections Bd.*, 440 U.S. at 184 (1979)(citing to *Panish*, 415 U.S. at 716).

(emphasis added) Here, voters in the general election are not only limited to the number of candidates from which to choose, they are now prevented from voting for any political party. The most they can do instead is to support someone else's stated "preference."

"Nothing is more plain to the student of history than the tendency of one party [in a two party system] to assimilate the principles and the policies of its opponent."[118] I-872 exacerbates this phenomenon by destroying the ability of political parties to protect their identity. Any candidate can claim a "preference" for any political party, regardless of the political views of the candidate or the party. Voter confusion is the necessary result.

I-872 LIMITS INDIVIDUAL RIGHTS OF POLITICAL ASSOCIATION

The central thrust of both petitioner's arguments to this Court is that because "primary voters are not choosing a party's nominee,"[119] the associational rights of individual candidates and voters are enhanced. This argument defies logic.

Even if the State and Grange were correct in asserting that I-872 does not nominate party candidates, I-872 would thereby deprive candidates of their rights of association by

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118. Andrew C. McLaughlin, *Political Parties and Popular Government*, in The Courts, the Constitution and Parties, 151 (1912). And, compare, "We choose between Tweedledum and Tweedledee." Helen Keller, *Letter to Mrs. Grindon*, Jan. 12, 1911, Published in the Manchester Advertiser, Mar. 3, 1911.

119. *Jones*, 530 U.S. at 585, and *see* Wash. Admin. Code 434-262-012.

forcing them to run as "independent" candidates who can express merely a "party preference." That is, I-872 allows candidates to speak *about* a political party on the ballot but deprives them of the right to speak *for* a political party on the ballot. At most, candidates can claim a mere "endorsement" and not a "nomination" by a political party. This court has already held that endorsements are "no substitute" for nominations.[120]

I-872 also deprives voters of the right to vote for a political party nominee, forcing them instead to vote for candidates only.[121] Both the Sixth and Ninth Circuits have recognized that "party identification is the single most important influence on political opinions and voting. . . . [T]he tendency to vote according to party loyalty increases as the voter moves down the ballot to lesser known candidates seeking lesser known offices at the state and local level."[122] By separating the candidate-party association process from the party candidate selection process, I-872 deceives voters who want to vote for party nominated candidates.

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120. *Jones*, 530 U.S. at 580.

121. *See, e.g., Panish*, 415 U.S. at 716.

122. *Washington State Republican Party v Washington*, 460 F.3d 1108 (2006), (*quoting Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992)). *See* Wash. App. at 21a-22a.

CONCLUSION

In many respects this case is very similar to *Cook v. Gralike*.[123] The sponsors of I-872 were determined to recover the blanket primary regardless of the consequences. They created a system that is unconstitutional on several levels. This court should not only affirm the Ninth Circuit decision, but it should declare emphatically that "top two" primaries deprive third party and independent candidates of their fundamental ballot access rights.

Respectfully submitted,

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WASHINGTON STATE GRANGE,

Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON STATE; et al.,

Respondents.

STATE OF WASHINGTON, et al.,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON STATE; et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Under Initiative 872, each candidate for partisan office freely self-selects a political party name that will be printed after his or her name on ballots without regard to the political party's willingness to have its name used by the candidate. A blanket primary then is used to determine, for each partisan office, which two candidates, and their self-selected associated party names, will advance to the general election ballot.

May the State of Washington force a political party to be associated on general election ballots with candidates for partisan office who have been neither selected by the party in accordance with its rules in a private process nor selected by the members of the party in a constitutional public primary?

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INTRODUCTION

This case addresses the extent to which the State may force a political party and its supporters in the electorate to accept association in the electoral process with candidates who are not their choice and who are allowed by the State to appropriate the party's name and goodwill for their own political campaigns. Petitioners seek a ruling allowing the State to evade the First Amendment's strong protection for fundamental political activities based on a cosmetic change in an unconstitutional blanket primary. Protection for fundamental constitutional rights should depend upon substance, not form. The decisions below holding Washington Initiative 872 unconstitutional should be affirmed.[1]

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Washington's Modified Blanket Primary (Initiative 872):

Sec. 8. RCW 29A.04.310 and 2003 c 111 § 143 are each amended to read as follows:

((~~Nominating~~)) Primaries for general elections to be held in November must be held on:

[1] The Initiative is referred to throughout as "Initiative 872." References to Grange Pet. App. are to the appendix to the Washington State Grange's Petition for a Writ of Certiorari, Docket No. 06-713; references to J.A. are to the Joint Appendix; references to State Br. are to the Brief for the Petitioner, State of Washington, *et al.* (Docket No. 06-730); and references to Grange Br. are to the Brief for the Petitioner, Washington State Grange (Docket No. 06-713).

(1) The third Tuesday of the preceding September; or ((~~on~~))

(2) The seventh Tuesday immediately preceding ((~~such~~)) that general election, whichever occurs first.

NEW SECTION. Sec. 11. A new section is added to chapter 29A.32 RCW to read as follows:

The voters' pamphlet must also contain the political party preference or independent status where a candidate appearing on the ballot has expressed such a preference on his or her declaration of candidacy.

STATEMENT OF THE CASE

A. Washington's Partisan Government

Federal, state and many local offices in Washington are partisan. WASH. REV. CODE § 29A.52.111; J.A. 411-12 (Initiative 872, § 4). Political parties and party affiliation are embedded in Washington constitutional and statutory law. For example, the Washington Constitution requires that redistricting be done by a commission whose voting members are chosen by the leaders of "the two largest political parties in each house of the legislature." WASH. CONST. art. II, § 43.[2] The State Constitution requires that

[2] Each house of the state Legislature has an official party caucus. *See* Washington Senate Democratic Caucus, http://senatedemocrats.wa.gov (last visited August 1, 2007); Washington State Senate Republican Caucus, http://senaterepublicans.wa.gov (last visited August 1, 2007); Washington House Democrats, http://housedemocrats.wa.gov (last visited August 1, 2007); Washington House Republicans, http://houserepublicans.wa.gov (last visited August 1, 2007).

the replacement for a vacancy in legislative office be from the "same political party" as the departing legislator and be selected from a list submitted by the departing legislator's political party. *Id.*, art. II, § 15.[3] Numerous government boards explicitly require apportionment of members based on political party affiliation.[4]

B. Partisan Campaigning in Washington

Under Initiative 872, any registered voter may become a candidate for a partisan office by filing a declaration of candidacy with the Secretary of State. J.A. 414-15 (Initiative 872, § 9). The declaration gives the candidate the option of identifying with a political party. J.A. 415

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[3] Initiative 872 could not change these constitutional provisions directly or by implication. *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 780 (Wash. 2000) ("The initiative process cannot be used to amend the constitution.").

[4] *See* WASH. REV. CODE § 34.05.610 (Joint Administrative Rules Review Committee); WASH. REV. CODE §§ 29A.44.410, 29A.44.420 (precinct election boards); WASH. REV. CODE § 36.70A.260 (Growth Management Hearing Boards); WASH. REV. CODE § 41.08.030 (Civil Service Commission); WASH. REV. CODE § 42.52.310 (Legislative Ethics Board); WASH. REV. CODE § 43.43.858 (Appointments to Organized Crime Advisory Board); WASH. REV. CODE § 42.17.350(1) (Public Disclosure Commission); WASH. REV. CODE § 44.04.220 (legislative children's oversight committee); WASH. REV. CODE § 44.28.010 (joint legislative review and audit committee); WASH. REV. CODE §§ 44.39.015, 44.39.025 (joint energy conservation and supply committee); WASH. REV. CODE § 44.55.020 (joint legislative oversight committee on trade policy; WASH. REV. CODE § 47.60.310 (ferry terminal area committees); WASH. REV. CODE § 80.01.010 (Utilities and Transportation Commission); WASH. REV. CODE § 82.03.020 (Tax Appeals Board); WASH. ADMIN. CODE 223-08-005 (forest practice appeals board); WASH. ADMIN. CODE 306-01-020 (Law Revision Commission); WASH. ADMIN. CODE 342-10-160 (Oceanographic Commission); WASH. ADMIN. CODE 371-08-315 (Pollution Control Hearings Board).

(Initiative 872, § 9(3)). The candidate may name any party without regard to the party's preference or the candidate's actual partisan activities. The State then places the name of the party listed on the declaration next to the candidate's name on the primary election ballot. J.A. 413-14 (Initiative 872, § 7(3)). A political party has no power to stop the use of its name by candidates, even if those candidates are dedicated activists for an opposing party.

In the primary election, Initiative 872 allows every voter to vote for any candidate, regardless of that voter's party affiliation. J.A. 412 (Initiative 872, § 5). At no point does a voter have to declare a party preference, so that voters who otherwise identify themselves as Republicans may cast votes for candidates listed as Democrats and *vice versa*.[5] A voter may vote for a "Republican" for one office, a "Democrat" for another and a "Libertarian" for a third. Under this process, voters who are loyal to one party may vote for one of their own as the candidate of an opposing party. For example, a candidate who may be a dedicated member of the Republican State Committee could declare as a Democrat, be identified on the primary ballot as a Democrat, and receive enough Democratic, Republican, and other votes in the primary to emerge as the Democratic Party's standard bearer for the general election. Moreover, under Initiative 872, voters who have a high level of fidelity to a party may be deceived by the misuse of party labels on the ballot into voting for candidates who are actually committed to the goals of an opposing party.

Under Initiative 872, the two candidates for any office who receive the most votes advance to the general election.

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[5] There is no party registration for voters in Washington.

J.A. 412-13 (Initiative 872, § 6(1)). Under this "top two" system, it is possible that the two general election candidates for an office will be of the same party.

Initiative 872, adopted in 2004, overrode a partisan primary system that was enacted by the Washington Legislature, also in 2004, to replace Washington's unconstitutional blanket primary.[6] Under the Legislature's system, major political party candidates advance to the general election by receiving the most votes in a primary in which voters are limited to voting for the candidates of only one party, thus indicating their affiliation with that party on the day of voting. WASH. REV. CODE §§ 29A.52.151, 29A.36.106, 29A.36.191, 29A.36.201. Under the Legislature's system, an independent candidate, or a candidate nominated for office by a minor party, is automatically entitled to appear on the general election ballot. WASH. REV. CODE §§ 29A.20.111, 29A.36.011, 29A.36.201, 29A.52.321. In contrast, under Initiative 872, minor party and independent candidates must compete against major political party candidates in a blanket primary and will reach the general election ballot only if they are one of the

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[6] In 2004, Washington's blanket primary was declared unconstitutional after four years of litigation between Washington's three major political parties, the Washington State Grange (the "Grange") and the Washington Secretary of State. *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213, and *cert. denied*, 541 U.S. 957 (2004). This Court previously examined Washington's blanket primary and its effects in connection with California's blanket primary. The data from Washington showed the dangers of a blanket primary: "One expert testified . . . that in Washington the number of voters crossing over from one party to another can rise to as high as 25 percent . . . and another that only 25 to 33 percent of all Washington voters limit themselves to candidates of one party throughout the ballot." *California Democratic Party v. Jones*, 530 U.S. 567, 578 (2000) (internal citations omitted).

top two vote-getters. J.A. 412-14 (Initiative 872, §§ 6(1), 7). For minor party and independent candidates, Initiative 872 therefore imposes greater hurdles to an appearance on the general election ballot.[7]

Initiative 872 did not alter the fundamentally partisan nature of Washington's electoral system, however.[8] Washington's electoral system is organized on explicitly partisan lines, and campaign contributions are regulated in conjunction with this partisan organization. For example, under both Initiative 872 and the Legislature's system, candidates must register and report campaign contributions and expenditures and, as part of that registration, state their party affiliation. Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. §§ 432(e), 433(a); WASH. REV. CODE §§ 42.17.020(38), 42.17.040. Under both systems, a political committee's statement of organization requires the committee to state the "party affiliation" of each candidate supported or opposed. FECA § 434(b)(5); WASH. REV. CODE § 42.17.040(2)(f).[9] Under both systems, during any campaign for partisan office, a candidate must

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[7] In addition, under the Legislature's system, minor party and independent candidates must be nominated by a convention or *ad hoc* meeting before the party's name can be used by the candidate. If multiple candidates wish to use the same minor party name, the issue is resolved through a summary court procedure. WASH. REV. CODE §§ 29A.20.121, 29A.20.171. By contrast, under Initiative 872, any candidate who desires to do so may freely use a minor (or major) party name.

[8] The Attorney-General summarized its effects in the 2004 Voter's Pamphlet: "[Initiative 872] would change the way candidates qualify to appear on the general election ballot, but would not otherwise change the way general elections are conducted." J.A. 405.

[9] A "candidate" is one who "seeks nomination for election, or election, to [office]." FECA § 431(2); WASH. REV. CODE § 42.17.020(9).

continue to identify his or her party affiliation (as indicated in his or her declaration of candidacy) in all campaign advertising. WASH. REV. CODE § 42.17.510(1). All political advertising mentioning the candidate also must include his or her political party.

> [S]ponsors of advertising supporting or opposing a candidate who has expressed a party or independent preference on the declaration of candidacy must clearly identify the candidate's political party or independent status in the advertising.
>
> . . . .
>
> To assist sponsors in complying with this requirement, the commission shall publish a list of abbreviations or symbols that clearly identify *political party affiliation* or independent status.

WASH. ADMIN. CODE 390-18-020(1), (3) (emphasis added).

Under both systems, contributions to candidates for office are limited. *See* FECA § 441(a); WASH. REV. CODE § 42.17.610 *et seq.* Bona fide political parties have higher limitations on their contributions and expenditures in state partisan races than other political committees.[10] For example, contributions to candidates for State legislative office are limited to $700 per person, and contributions to candidates for other State offices are limited to $1400 per person. WASH. REV. CODE § 42.17.640(2), (3). These limits

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[10] A bona fide political party is either a governing arm of a major political party or a minor party that nominates a candidate pursuant to WASH. REV. CODE § 29A.20.010 *et seq.* As the Initiative repealed the minor party nominating statutes, Grange Pet. App. 83a. at n.25, under Initiative 872 there is no longer a statutory basis to include a minor political party within the definition of a "bona fide political party."

do not apply to a "bona fide political party" or a "caucus political committee." *Id.*

C. Political Party Names and Washington Ballots

Since Congress created the Washington Territory,[11] political parties have played a leading role in shaping its public debate. In the first major territorial election in Washington, candidates' party affiliations were prominently reported.[12] Then, as now, party affiliations associated the candidates with specific positions on issues that were important to the voters of the day, such as possible annexation of Hawaii, the disposition of lands held by the British Hudson Bay Company, and public funding for the Pacific Railway.[13] Party affiliation informed voters as to the likelihood that a candidate would align with the majority or minority party in Congress or with then-President

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[11] *See* An Act to Establish the Territorial Government of Washington, 10 Stat. 172 (Mar. 2. 1853).

[12] "Col. [J. Patten Anderson] is a [D]emocrat of the purest kind – is a young man of the highest moral worth – possessing the order of talents, and who in discharge of his first duty as Marshal, in taking the census, has learned the character of our territory, its interests, and its wants. Should he be the nominee of the [D]emocratic convention, his election of course will be certain. . . ." Vox Populi [pseudonym], Letter to the Editor, WASH. PIONEER, Dec. 10, 1853, at 2, col. 4. The *Washington Pioneer* later reprinted a quote, attributed to Jefferson Davis, that Colonel Anderson "was one of the best [D]emocrats, most worthy and promising young men in the State of Mississippi." *Candidates Before the Convention*, WASH. PIONEER, Jan. 21, 1854, at 2.

[13] *See Whig Nomination for Congress – Position of Parties – Anticipated Result of Election*, WASH. PIONEER, Jan. 7, 1854, at 2. Thus, for example, it was advertised that a Democratic candidate for delegate would support purchase of the "Sandwich Islands" (Hawaii), and encourage the railroad to be constructed by "private enterprise" with a termination point at Puget Sound. *Id.*

Franklin Pierce – a significant consideration at the time with respect to the protection of territorial interests in Washington, D.C.[14]

Washington adopted its first state election laws upon entering the union in 1889. Washington's first election ballots had to name the "party or principle" that each candidate "represents." 1889-90 Wash. Sess. Laws, ch. XIII, § 17. This conjunction of party name and candidate name on ballots has continued ever since.

In 1907, Washington required major political parties to use public primaries to select their general election candidates. "Hereafter, all candidates for elective office . . . shall be nominated at a direct primary election held in pursuance of this act." 1907 Wash. Sess. Laws, ch. 209, § 2. Political organizations previously "represented" on the ballot were entitled to have a "separate primary election ticket" and to use separate primary ballots. *Id.* at §§ 6, 11. A voter seeking a party ballot, if challenged, was required to affirm affiliation with the party whose ballot was sought. *Id.* at § 12. Candidates were required to swear

[14] In 1854, it was urged that a vote for a Democratic candidate, as opposed to a Whig candidate, would carry more weight, as Democrats held a congressional majority and because President Pierce was a Democrat: "But what advantage could possibly accrue to our Territory by sending to Congress any other than an unmistakable Democrat. With a Democratic administration in power at Washington – with an overwhelming majority in both branches of Congress – with Democratic Territorial officials, and the prospect of our party being largely in the majority in the Legislative Assembly, what motive could induse [sic] the people to select a Delegate who would be everywhere, in his official position, in the minority . . . ? . . . It were not only folly, but imbecility to suppose that the interests of the Territory could be advanced equally by a Democratic or Whig candidate to Congress. . . ." *Whig Nomination for Congress*, *supra* note 13.

that they were members of the political party they sought to represent and to declare themselves candidates for nomination by the party to particular offices. *Id.* at § 4. The winners of the primary became the "nominees of the said political parties of which they are candidates." *Id.* at § 24(3).

From 1935 until 2004, Washington forced political parties to select their candidates in a "blanket primary," where non-party members could participate and influence the choice of candidates. REM. REV. STAT. OF WASH., ch. 26, § 5195-1 (1935). Each ballot in the blanket primary carried the names of all candidates from all parties, and each candidate's name was followed by his or her political party. WASH. REV. CODE §§ 29.030.095, 29.030.020(3), *invalidated by Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003). The candidate receiving the plurality of votes cast in the primary for candidates of that same party became the party's nominee at the general election. State Br. 11.

Following the invalidation of Washington's blanket primary in 2004, Washington replaced the blanket primary with the Legislature's system described above.[15]

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[15] *See supra* note 6. The adoption of the replacement also led to litigation. *See Washington State Grange v. Locke*, 105 P.3d 9 (Wash. 2004). The legislation sent to the Governor was entitled "An Act relating to a Qualifying Primary" and included both a "Montana" style primary and a "top two" primary similar to Initiative 872. The Governor vetoed the "top two" portion of the bill, citing a number of concerns including a concern "that the top two primary system would effectively deny minority and independent candidates access to the general election ballot." *Id.* at 14. The Grange challenged the adoption of the "Montana" style primary itself as well as the Governor's veto of legislation creating a primary similar to Initiative 872, arguing that a

(Continued on following page)

D. The Blanket Primary Returns as Initiative 872.

The Washington State Grange (the "Grange") was not satisfied with Washington's replacement primary. As soon as the Governor signed the 2004 replacement primary law, the Grange launched an initiative campaign to "institute a 'modified' blanket primary system . . . in which voters will not be restricted to choosing among the candidates of only one party in a primary election." J.A. 798. "Our initiative will put a system in place which looks almost identical to the blanket primary system we've been using for nearly 70 years," said Grange President Terry Hunt. J.A. 798.

The Grange's campaign material explained to voters Initiative 872's mechanics:

> At the primary, the candidates for each office will be listed under the title of that office, the party *designations* will appear after the candidates' names, and the voter will be able to vote for any candidate for that office (*just as they do now* in the blanket primary).

J.A. 69 (emphasis added).

According to the Grange, Initiative 872's purpose was to allow non-members of parties to exercise the same control over partisan candidate selection and party messaging that they had under the unconstitutional blanket primary: "Initiative 872 gives voters this freedom to choose any candidate in the primary. . . . [It] gives voters the kind

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"Montana" primary was not a "qualifying primary" and thus was not within the scope of the bill subject. The Washington Supreme Court disagreed, holding that the everyday meaning of "qualifying primary" did encompass a "Montana" primary. *Id.* at 20-21.

of control that they exercised for seventy years under the blanket primary." J.A. 78-79.

Initiative 872 was intended to force political parties to alter their selection of candidates and campaign messages. "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters." J.A. 406. Adoption of Initiative 872 would "force" political parties to recruit mainstream candidates and thereby coerce the candidates to run campaigns appealing to the entire electorate, not just supporters of the party in whose name they ran. *See* J.A. 70, 73, 406.

Initiative 872 passed in November 2004 and became law 30 days later. WASH. CONST. art. II, § 1(d). Under the Initiative, any candidate who so requested could use any political party's name after his or her name on election ballots. J.A. 413-14 (Initiative 872, §§ 7(3), 12). Election officials refused to recognize separate party nomination processes. J.A. 104-11.

As promised, Initiative 872 effectively reinstituted the blanket primary, but it otherwise made no fundamental changes in Washington's election processes or partisan organization of government. It did not repeal the exemption for major political parties from contribution limitations, or the requirement that advertising in partisan races indicate the candidate's political party affiliation as specified in the declaration of candidacy, or the numerous restrictions on board and commission membership based on party affiliation.

E. The Washington State Democratic Party Rules Relating to Candidate Selection

The Democratic Party has rules governing the use of its name by candidates in general elections.[16] The reasonableness of these rules has not been challenged.

The Washington State Democratic Party is constituted pursuant to its Charter.[17] J.A. 236. According to Charter Article VII(C)(3), Democratic candidates and nominees must be chosen by Democrats, except that by special bylaw, the Party may allow participation by voters who do not wish to disclose their Democratic affiliation. J.A. 258. These policies are crucial for the party to function effectively:

> The goals of the [Democratic] Party include adopting statements of policy to serve as standards for Democratic elected officials and goals for the people of the state, nominating and assisting in the election of Democratic candidates at all levels who support the goals of the Party, and working with elected Democratic public officials at all levels to achieve the goals of the Democratic Party. The close relationship ... is fostered by requiring that the selection of candidates using the party name be done by voters who affiliate with the Democratic Party.

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[16] These rules apply unless the State requires the party to select its general election candidates in a constitutional public partisan primary in which participation by non-Democrats is limited, consistent with this Court's decisions in *Jones* and *Tashjian*. *See Jones*, 530 U.S. at 572.

[17] The Charter was adopted at the Washington State Democratic Convention in 1976, and thereafter amended. Under Washington law the "state convention of a major political party is the ultimate repository of statewide party authority." *King County Republican Central Comm. v. Republican State Comm.*, 484 P.2d 387, 392 (Wash. 1971).

. . . .

> . . . The Party has expended considerable time and expense to develop a coherent set of goals and principles that guide the Party, and to create a corresponding "brand awareness" among the electorate for candidates identified as Democrats. Allowing any candidate, even those that are hostile to the Party, to misappropriate the Party name and appear on the ballot as a Democratic candidate will undermine this name association that has built up in loyal Party voters' mind.

J.A. 236-37, 239.

The Charter limitations are implemented by the Bylaws of the Washington State Democratic Party:

> [C]andidates and nominees for public office who are or will be identified as Democrats or publicly associated with the Democratic Party to any extent in the general election for such office must be selected in accordance with Rules adopted by the State Central Committee. . . . In connection with any selection process in which voters who are not members of the Democratic Party are permitted to participate, the State Central Committee may require that candidates demonstrate prior to filing for office reasonable support from Party members in order to be eligible to participate in the selection process. . . .

J.A. 164-65 (Bylaws: Articles XI.B, XI.C).

Pursuant to these Bylaws, the Washington State Democratic Central Committee has adopted Rules for the Selection of Candidates and Nominees for Public Office. J.A. 265-74. These rules require that candidates associated with the Democratic Party on election ballots be

chosen either (1) by a public primary, in which affiliates of other political parties cannot participate in the selection of Democratic candidates for advancement, or (2) by a specified private meeting of Democrats. A candidate must also demonstrate a modicum of support from Democratic voters to be eligible as a Democratic candidate or nominee. J.A. 273-74.

F. Procedural History

After adoption of Initiative 872, the Republican and Democratic parties instituted alternative private processes for nominating candidates for the November 2005 local partisan races. The Republican Party requested assurance from election officials that these political party nomination processes would be recognized. J.A. 82-87. Election officials refused to give that assurance and indicated that any nomination process by political parties would be ignored in connection with candidate filings in partisan elections. J.A. 104-11.

Shortly thereafter, the Republican Party filed suit against local election officials in the United States District Court for the Western District of Washington, seeking to permanently enjoin Initiative 872 as unconstitutional. Washington's two other major political parties, the Democratic and Libertarian Parties, immediately intervened as additional plaintiffs. J.A. 18-20, 39-42. The Grange then also intervened to defend Initiative 872, and the Secretary of State followed to represent all election officials and the State.

1. The District Court Enjoins Initiative 872.

The political parties asserted that Initiative 872 severely burdened their right of association under the First Amendment, U.S. CONST. amend. I, by compelling them to associate with candidates they have not chosen (nor are allowed to choose), forcing them to adulterate their candidate selection process by accepting participants ineligible under their rules, and depriving them of their right to select their standard bearers. Additionally, the parties challenged Initiative 872 on Equal Protection grounds, arguing that by allowing minor political parties to nominate candidates but not major parties, the Initiative denied equal rights to the major political parties.[18]

The district court determined that Initiative 872 severely burdened the political parties' right of association. Specifically, Initiative 872 prevented political parties from exercising their constitutional right to nominate their candidates and converted any attempt by parties to do so into a mere endorsement. The district court reasoned that endorsement is not a constitutionally acceptable substitute for a party's selection of its own candidates, citing this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). Grange Pet. App. 66a.

The district court found that Initiative 872 forced the parties to associate with unwanted candidates on ballots. The district court rejected arguments that printing party preferences on ballots did not imply nomination,

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[18] The district court did not resolve the Equal Protection issues in light of its conclusion that Initiative 872 was unconstitutional and that, if it were constitutional, it repealed the minor party nomination statutes which created the Equal Protection issues. Grange Pet. App. 84a.

endorsement or support of the candidate by the party. The court noted, among other things, that statutes left untouched by Initiative 872 demonstrate that the party name was used on the ballot as a party designation for party candidates, recognizing, "[a]ny attempt to distinguish a 'preferred party' from an 'affiliated party' is unavailing in light of Washington law." Grange Pet. App. 68a. The court also rejected the Grange's argument that candidates had a First Amendment right to use a political party's name on ballots: "An individual has no right to associate with a political party that is an 'unwilling partner.'" Grange Pet. App. 69a. "The Court is persuaded . . . that allowing any candidate, including those who may oppose party principles and goals, to appear on the ballot with a party designation will foster confusion and dilute the party's ability to rally support behind its candidates." Grange Pet. App. 79a.

The court also ruled that Initiative 872 was "[i]n all constitutionally relevant respects . . . identical to the blanket primary invalidated [in the parties' 2000-2004 litigation]." Grange Pet. App. 72a.[19]

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[19] The district court found that Initiative 872 was not materially different from the blanket primary based on six factors:

> (1) Initiative 872 allows candidates to designate a party preference when filing for office, without participation or consent of the party; (2) requires that the political party candidates be nominated in Washington's primary; (3) identifies candidates on the primary ballot with party preference; (4) allows voters to vote for any candidate for any office without regard to party preference; (5) allows the use of an open, consolidated primary ballot that is not limited by political party and allows crossover voting; and (6) advances candidates to the general election based on open, "blanket" voting.

Grange Pet. App. 72a.

> Primary voters [under Initiative 872] are choosing a party's nominee. Initiative 872 burdens the rights of the political parties to choose their own nominee by compelling the parties to accept any candidate who declares a 'preference' for the party, and allowing unaffiliated voters to participate in the selection of the party's candidate . . . *Jones* allows little room for 'outside' involvement in 'intraparty' competition.

Grange Pet. App. 71a.

Because Initiative 872 imposed a severe burden on the political parties' First Amendment rights, the district court determined that the Initiative was unconstitutional unless narrowly tailored to advance a compelling state interest. The court observed, however, that "[t]he State of Washington and the Washington State Grange *do not argue* that Initiative 872 is narrowly tailored to meet a compelling state interest." Grange Pet. App. 75a (emphasis added). According, the district court found it was unconstitutional. Grange Pet. App. 79a.

Finally, the district court analyzed whether the use of party names by candidates under Initiative 872 could be severed from the remaining constitutional provisions under State law. It reasoned that "the effect of [the] deletions would be to substantially dismantle the partisan primary system adopted by Initiative 872," and thus concluded the Initiative was not severable. Grange Pet. App. 89a.[20] Based on these findings, the district court

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[20] A nonpartisan election system is inconsistent with what the sponsors told voters they would get if they passed Initiative 872. In a Frequently Asked Questions document posted on the "Yes on 872" website in January 2004, the Grange stressed that government in

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enjoined implementation of Initiative 872. Grange Pet. App. 91a-92a.

2. The Court of Appeals Affirms the District Court.

On review, a unanimous panel of the U.S. Court of Appeals for the Ninth Circuit upheld the district court. It found that Initiative 872 retains a partisan primary, in which each candidate can self-identify on ballots with a political party regardless of the party's willingness to associate with the candidate.

> Given that the statement of party preference is the sole indication of political affiliation shown on the ballot, that statement creates the impression of associational ties between the candidate and the preferred party, irrespective of any actual connection or the party's desire to distance itself from a particular candidate. The practical result of a primary conducted pursuant to Initiative 872 is that a political party's members are unilaterally associated on an undifferentiated basis with all candidates who, at their discretion, "prefer" that party.

Washington would remain partisan and candidates' parties would continue to be indicated on ballots:

> **If Washington adopts a qualifying primary, does this mean that the offices become nonpartisan?**
>
> No. Candidates *will continue* to express a political party preference when they file for office and that party designation will appear on the ballot. An office would only become nonpartisan if the Legislature adopts a statute prohibiting party designations on the ballot for candidates for that office.

J.A. 73 (emphasis added).

Grange Pet. App. 22a. "Such an assertion of association by the candidates against the will of the parties and their membership constitutes a severe burden on political parties' associational rights." Grange Pet. App. 25a.

The court rejected petitioners' arguments that Initiative 872 created a nonpartisan blanket primary as discussed in *Jones*. Grange Pet. App. 15a. The panel concluded that the term "nonpartisan" in *Jones* contemplated "elections in which primary voters play no role in the nomination of any candidate as the representative of a political party." Grange Pet. App. 18a.

> The Initiative thus perpetuates the "constitutionally crucial" flaw *Jones* found in California's partisan primary system. Not only does a candidate's expression of a party preference on the ballot cause the primary to remain partisan, but in effect it forces political parties to be associated with self-identified candidates not of the parties' choosing. This constitutes a severe burden upon the parties' associational rights.

Grange Pet. App. 19a-20a.

The panel noted that neither the State nor the Grange had identified any compelling state interest advanced by Initiative 872 and, in any event, that Initiative 872 was not narrowly tailored. Grange Pet. App. 3a-4a. In the absence of any articulation by the State or the Grange of any compelling state interest, the Court of Appeals attempted to "read compelling state interests between the lines of their arguments[.]" Grange Pet. App. 30a. It determined that the interests were essentially the same as those articulated and found inadequate by this Court in *Jones* and that such interests could be "sufficiently served by a more narrowly tailored primary system." Grange Pet.

App. 30a. Accordingly, it affirmed the district court's conclusion that Initiative 872 was unconstitutional. With respect to severability, the Court of Appeals determined that it was "not reasonable to believe that Washington voters would have passed Initiative 872 if they knew it would result in nonpartisan primaries for all statewide offices." Grange Pet. App. 33a.

The State and Grange petitioned for a writ of *certiorari*, which this Court granted.

SUMMARY OF ARGUMENT

Initiative 872 achieves what this Court has characterized as a "stark repudiation of freedom of political association." *California Democratic Party v. Jones*, 530 U.S. 567, 582 (2000). In both intent and practice, the Initiative resurrected a partisan primary system virtually identical to the one *Jones* held unconstitutional. Like the unconstitutional blanket primary it emulates, Initiative 872 has the likely outcome – indeed the intended outcome – of changing the parties' message against their will. Under the First Amendment, the State may not force political parties to select candidates other than those they would select of their own accord. A "party's choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 372 (1992) (Stevens, J., dissenting). Initiative 872 severely burdens the parties' rights of association, and neither the State nor the Grange has articulated how the Initiative is narrowly tailored to advance a compelling state interest.

Initiative 872 is not the same as the hypothetical nonpartisan blanket primary described in *Jones*. The Court discussed a nonpartisan blanket primary only as an example of the narrow tailoring required to justify a severe burden on First Amendment rights, where compelling state interests were assumed to exist. The Court did not suggest that a nonpartisan blanket primary necessarily imposed no severe burden on First Amendment rights and, moreover, Petitioners have never identified a compelling state interest served by Initiative 872.

Nor, as the State contends, does Initiative 872 remove the State from the party nominating process. The State has it backwards: Initiative 872 removes the *party* from *its own* nominating process. Initiative 872 forces party supporters to loan their party's name to any candidate who wishes to use it, while barring party supporters from selecting a candidate who will carry their party's name on the general election ballot. In so doing, Initiative 872 prohibits the exercise of well-recognized rights of political parties. The district court and Court of Appeals correctly applied the analytical framework that this Court has clearly articulated, first determining the character and magnitude of the burden on First Amendment rights of association posed by Initiative 872, then considering the interests offered by the State both to justify that burden and the extent to which it was necessary to satisfy legitimate interests. Relying on that analysis, both courts found Initiative 872 unconstitutional.

The Grange stands alone in making several red herring arguments, none of which justify reversal. First, the Grange asserts that the First Amendment rights of a political party to determine its own message and select

those who speak in its name are outweighed by a candidate's claimed First Amendment right to compel association with the party on an election ballot. A candidate has no such right. Second, the Grange asserts that the lower courts should have severed the Initiative's requirement that a candidate's choice of party be printed on the ballot in order to save the Initiative. Such a rewriting of the Initiative by the courts would effectively convert Washington State's partisan system of government into a nonpartisan system. The use of party labels on ballots by candidates and the burdens imposed by Initiative 872 upon First Amendment rights are not incidental to the main purpose of the Initiative – they *are the main purpose* of the Initiative. The Court of Appeals and district court correctly concluded that the Initiative was not severable. Third, the Grange asserts that in the interests of protecting a State's freedom to serve as a laboratory of democracy, this Court should uphold Initiative 872. Federalism does not require this Court to look the other way when a State intentionally invades core First Amendment rights for no good reason.

The Court of Appeals and the district court correctly declared Initiative 872 unconstitutional. Their decisions should be affirmed.

ARGUMENT

A. Initiative 872 Violates the Freedom of Association of Political Parties.

Initiative 872 uses the power of the state to compel political parties to associate with candidates who have not been selected by the members of the party. It violates the

right of freedom of political association recognized in *Jones*.

1. A Political Party's Candidates are Part of its Message.

A political party's selection of candidates for the ballot is inherently part of its political message. This Court consistently has recognized the fundamental connection between choosing candidates for a party and choosing a message for a party.

> In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views.

Jones, 530 U.S. at 575. "[R]egulating the identity of the parties' leaders . . . may color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 n.21 (1989).

"It is through its candidates that a party is able to give voice to its political views, to engage other candidates on important issues of the day, and to affect change in the government of our society." *Clingman v. Beaver*, 544 U.S. 581, 612 (2005) (Stevens, J., dissenting). "Nominees of the party bring their images and visibility, their priorities and positions on issues to the party. In the eyes of many voters, *they are the party*. Their quality and ability also determine, to a considerable extent, the party's chance for

victory in the general election." PAUL ALLEN BECK, PARTY POLITICS IN AMERICA 196 (8th ed. 1997) (emphasis added). Thus, the selection of a candidate for office "is an ultimate and crucial element of the party members' political activities." *Nader v. Schaffer*, 417 F. Supp. 837, 844 (D. Conn.), *summarily aff'd*, 429 U.S. 989 (1976).

2. The First Amendment Guarantees a Political Party the Right to Determine its Message.

Forcing, as Initiative 872 intends to do, political parties to choose candidates congenial to the majority, rather than candidates who may better articulate the party's message, offends the First Amendment:

> Both of these supposed [compelling state] interests, therefore, reduce to nothing more than a stark repudiation of freedom of political association: Parties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not be congenial to the majority.
>
> We have recognized the inadmissibility of this sort of "interest" before. In *Hurley* . . . we held [that the law's] "object [was] simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. . . . [I]n the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids."

Jones, 530 U.S. at 582 (internal citation omitted).[21]

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[21] "[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his

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The State may not force associations on political organizations to encourage popular views or discourage unpopular views. *Cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) ("the law . . . may not interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may seem."). A political organization has the right to choose which issues it wants to emphasize through its candidates and which it wants to ignore. *Cf. id.* at 655-56 ("The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message and not the other.").

3. Initiative 872 is Unconstitutional Because it Places a Severe Burden on First Amendment Rights and is Not Narrowly Tailored to Advance a Compelling State Interest.

As was the case in *Jones*, altering political party messages is not just the likely outcome of the Initiative 872, it is the *intended* outcome. *See, e.g.*, J.A. 70 ("This proposed initiative will ensure that the candidates who appear on the general election ballot are those who have the most support from the voters, not just the support of the political party leadership."); J.A. 78 ("Parties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters[.]"). Like the blanket

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own message." *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 566, 573 (1995).

primary struck down in *Jones*, Initiative 872 places the heaviest burden imaginable upon the associational rights of political parties.

Initiative 872 forces political parties to change their message in at least two ways. First, it takes away from the political party the fundamental choice of whether to continue an internal debate by advancing a ticket of candidates with differing views on issues or to end the debate by selecting a single candidate and rallying behind him or her. Under Initiative 872, that choice is made by the entire electorate, not a party's adherents. Second, by allowing the whole of the electorate to make the choice of which party candidates will advance to the general election, it encourages candidates to talk only about issues that are congenial to the majority. It discourages candidates from bringing new and controversial ideas into the political debate and building support over time for those issues which the candidate and the party may believe are critical to the future well being of the country even if rejected (or even despised) by mainstream voters.

The State's assertion that parties are not harmed by Initiative 872 because they remain able to endorse candidates and expend finite party resources helping those candidates wrest the party's name away from drive-by candidates is an irrelevant response that highlights – not excuses – the burden placed upon associational rights: "The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee." *Jones*, 530 U.S. at 580.[22] It is

[22] "[T]he ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with

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also a particularly disingenuous argument since Washington's political advertising statutes and regulations require that after a drive-by candidate co-opts a political party's name at filing, any advertising by the party to distance itself from the candidate must nevertheless state that the candidate is in fact affiliated with the party, even if the point of the advertising is to say the candidate and his or her positions are anathema to the party. WASH. ADMIN. CODE 390-18-020.[23]

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the party leadership, but do not want the party's choice decided by outsiders." *Jones*, 530 U.S. at 581.

[23] Campaign finance laws also limit a party's ability to assist an endorsed candidate in distinguishing him or herself from other candidates using the party name. These limitations on coordinated party expenditures, much like expenditure limits in general, burden parties speech by "preclud[ing them] from effectively amplifying the voice of their adherents," *Buckley v. Valeo*, 424 U.S. 1, 22 (1976), rendering the party impotent to convey who is its genuine "ambassador to the generate electorate." *Jones*, 530 U.S. at 575.

> Federal campaign finance laws place strict limits on the manner and amount of speech parties may undertake in aid of candidates. Of particular relevance are limits on coordinated party expenditures, which the Federal Election Campaign Act of 1971 deems to be contributions subject to specific monetary restrictions. *See* 90 Stat. 488, 2 U.S.C. s. 441a(a)(7)(B)(i).

530 U.S. at 588 (Kennedy, J. concurring). Justice Kennedy emphasized that based on this Court's decision in *Colorado Republicans Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996), a majority of this Court concluded that "Congress or a State may limit the amount a political party spends in direct collaboration with its preferred candidate for elected office." *Jones*, 530 U.S. at 588 (Kennedy, J. concurring).

Political parties under Initiative 872 find their associational rights wrapped in a constitutional straight jacket: Unable to control the use of their name and forced to expend resources in order to effectively distinguish their preferred candidate during the primary, the parties now find their freedom of speech restricted in the amount of resources

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When the State scripts an organization's message, selects the messenger, and limits how much support the messenger may enjoy, it has fundamentally and severely burdened core First Amendment freedoms. Initiative 872 does just that. It is therefore unconstitutional unless narrowly tailored to advance a compelling state interest. *Timmons*, 520 U.S. at 358; *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The burden of proof is on the defenders of the Initiative to demonstrate that it advances a compelling state interest, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978), and to show that it "is narrowly drawn to achieve that end." *Boos v. Berry*, 485 U.S. 312, 321 (1988) (quoting *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983)).

As both the district court and the Court of Appeals recognized, Petitioners have failed to *identify* any compelling interest, much less demonstrate that Initiative 872 advances one.[24] Moreover, any potential legitimate compelling interest advanced by Initiative 872 would be equally well advanced by allowing a candidate to use a political party's name on the ballot only when that party has

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they can legally expend to promote "vigorous and open support of [their] favored candidate[.]" *Id.* at 589.

[24] Although Petitioners do not assert any compelling interest, they advance the justification that under Initiative 872, "[p]arties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters." J.A. 78. Parties that aim to win must certainly seek broad public support. However, there can be new, small or temporary parties that participate in elections to achieve other goals, such as spreading new political ideas and building a base of support for them or even just opposing a particular measure. They may not expect to win immediately. The State has no interest in promoting "mainstream" candidates over those whose ideas are not going to capture majority support in the electorate. *See Jones*, 530 U.S. at 582.

selected that candidate as one of its standard bearers. Candidates would remain free to run using only their own names or to form their own political parties whose name they could then use. Petitioners cannot argue that Initiative 872 is narrowly drawn.[25]

B. Initiative 872 Does Not Create a "Nonpartisan" Blanket Primary, Nor is Such a Primary Immune from Constitutional Scrutiny.

Petitioners erroneously contend that Initiative 872 is a "nonpartisan blanket primary" as described in *Jones* and, therefore, receives a free pass under the First Amendment. Petitioners rely upon this quote from the opinion:

> *[E]ven if all these state interests were compelling ones*, Proposition 198 is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a nonpartisan blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot – which may include nomination by established parties and voter-petition requirements for independent candidates. Each

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[25] The State asserts that "primaries are not the exclusive method of determining party nominees, nor is determining party nominees the exclusive purpose of a primary or opening round election." State Br. 7. While that may be true, it is equally true that use of the alternative methods described by the State, such as cumulative voting or instant runoff voting, need not interfere with a political party's right to select its candidates. Any such system can be readily tailored to limit use of party names on ballots to candidates selected by the party without interfering in any material respect with the purpose of the alternative system.

> voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election.

530 U.S. at 585-86 (emphasis added).[26]

Petitioners' argument fails for two alternative reasons. First, the Court's observation does not suggest that a nonpartisan blanket primary necessarily imposes no burden on First Amendment rights. On the contrary, a nonpartisan blanket primary is suggested as a means of narrow tailoring when imposing severe burdens on First Amendment rights in order to advance compelling state interests. Second, Initiative 872 created a partisan blanket primary.

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[26] The Grange characterizes this portion of the opinion as the *Jones's* "legal ruling," asserting that "*Jones* held" such a system constitutional, and that this Court's "authorized" such a system, Grange Br. 18, 30, 48, in arguing that the Court of Appeals' decision "directly contradicts this Court's *ruling* in *Jones*." Grange Br. 32 (emphasis added). At best the Grange is overreaching: the *Jones* opinion only discussed a nonpartisan blanket primary as a means to advance compelling state interests which were not present in *Jones* and are not present here. At worst the Grange is guilty of ignoring Chief Justice Marshall's admonition: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia*, 6 Wheat. 264, 399-400, 5 L.Ed. 257 (1821); *see also Parents Involved in Community Schools v. Seattle School Dist. No. 1*, __ U.S. __, 127 S.Ct. 2738, 2762 (2007) (citing *Central Va. Community College v. Katz*, 546 U.S. 356, 363 (2006)).

1. All Blanket Primaries Must Comply with the First Amendment.

At their core, Petitioners' arguments assume that the Court intended to bless a nonpartisan blanket primary system as a means of freely forcing candidates on political parties and allowing party names to be freely used on ballots by all comers. This reads too much into the *Jones* dicta and ignores the context of the discussion. The specific primary described in *Jones* contemplates using political party names on ballots in conjunction with candidate names where those candidates have been nominated by the political parties whose names are used. *See Jones*, 530 U.S. at 598 n.8 (Stevens, J., dissenting) (explaining that "what the Court calls a 'nonpartisan primary' . . . [is one] in which candidates *previously nominated* by the various political parties and independent candidates compete." (emphasis added)). At no point in *Jones* did the Court suggest that the State was free to appropriate political party names for its own uses.

This Court's opinion in *Jones* held that State interference with a party's right to select a candidate imposes a heavy burden on First Amendment rights. *Id.* at 582 (majority opinion). Nevertheless, Petitioners interpret *Jones* to mean the State can interfere with the party's selection of *one or two* candidates in the "top two" system while imposing only a *de minimis* burden on First Amendment rights. This converts the focus of *Jones* from vigorous protection of First Amendment rights to authorizing an invasion of those rights. Respondents respectfully suggest that the fundamental point of the discussion in *Jones* was protecting associational rights, not providing a loophole by which States may meddle in the internal affairs of political parties.

2. Initiative 872 Did Not Create a Nonpartisan Blanket Primary.

Nor should the Court accept the State's *ipse dixit* that Initiative 872 created a nonpartisan blanket primary. The State contends that printing of the party's name after the candidate's name on the ballot does not form an association between the candidate and the party. State Br. 44. This strains credulity.

Throughout Washington's history, the printing of a party name after a candidate's name on ballots has indicated an association with the named party. Conversely, candidates not formally nominated by a party could appear on the ballot as "an electors' or independent candidate for the office," but not as a party candidate. *State ex rel. Hewen v. Elliott*, 48 P. 734, 735 (Wash. 1897).

The reason for this rule was evident – an official party designation on the ballot carried with it an inherent message to the voter that the party had nominated the candidate as its standard bearer:

> The law gives [the voter] the right to assume that, if he wishes to vote for all the candidates of the Republican party, all he has to do is to make his check mark opposite the words "Republican Ticket," at the head of its group of candidates; and that, if he desires to vote for the Democratic, People's, Prohibition, or other party, he has only to make his check opposite the words which designate such party, printed at the head of the respective groups of candidates.

State ex rel. Bloomfield v. Weir, 31 P. 419, 420 (Wash. 1892).[27] As a result, placing an independent candidate under the designation of a party that had not nominated him would be "opening the door to the perpetuation of a fraud, – would in fact be offering an inducement therefor [sic]." *Philips v. Curtis*, 38 P. 405, 407 (Idaho 1894) (candidate nominated only by electors had no right to appear on the ballot as a candidate of the "People's Party").

Sponsors of Initiative 872 did not promote it as changing the historic partisan meaning of Washington ballots; they promoted it as a continuation.[28] The State's official Explanatory Statement indicated that historic election practices would continue. "This measure would change the way that candidates qualify to appear on the general election ballot, but would not otherwise change the way general elections are conducted." J.A. 405.

As noted above, selecting a party in a declaration of candidacy binds the candidate's name and the party's name for the duration of the campaign. Provisions of state law reinforce the binding nature of the party identification used on the primary ballot. For example, any candidate who declares a party preference must thereafter identify

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[27] In the earliest days of Washington's statehood, ballots were organized by party, and voters could vote for a compendium of candidates under that party heading. Voters could also modify the slate by erasing candidates they did not wish to support. *See Weir*, 31 P. at 419-20.

[28] "[T]he party designations will appear after the candidates' names, and the voter will be able to vote for any candidate for that office (just as they now do in the blanket primary)." J.A. 69. A Frequently Asked Questions document distributed by sponsors of the Initiative assured voters that "candidates will *continue* to express a political party preference when they file for office and that party designation will appear on the ballot." J.A. 169 (emphasis added).

themselves with that "party designation" in all political advertising. WASH. REV. CODE § 42.17.510(1). This use of party designation is to indicate the "candidate's political party." WASH. ADMIN. CODE 390-18-020. Not only the candidate, but anyone who supports or opposes the candidate must also identify the candidate's political party in advertising using the party designation. *Id.*

In sum, merely affixing the (inaccurate) label of "nonpartisan" to the Initiative 872 blanket primary cannot satisfy the constitutional scrutiny mandated in *Jones*. The lower courts appropriately rejected this argument as a sufficient basis to save the Initiative.

C. The State Has Not Removed Itself from the Party Nomination Process – It Has Removed the Party from the Party Nomination Process.

The State nevertheless contends that it may force candidates upon unwilling political parties so long as it does so in a process that purportedly does not "nominate" candidates. State Br. 41-47. The State's distinction is doubly doubtful.

First, Initiative 872 creates an election system in which candidates and party names are associated on public ballots whether or not the party and the candidate both agree to the association. It violates the defining characteristic of *freedom* of association: "a corollary of the right to associate is the right not to associate." *Jones*, 530 U.S. at 574. Pursuant to Initiative 872, voters in a primary determine which candidates – and their associated party names – advance to the general election. Thus, whether the Initiative 872 primary "nominates" or merely

"winnows," as the State and Grange allege, these are "two sides of the same coin." Grange Pet. App. 18a at n.14.

Second, the State's suggestion that party candidates are not nominated by voters under Initiative 872 ignores the plain meanings of "nominate" and "primary." "Nominate" means: "to propose by name as a candidate, especially for election." Grange Pet. App. 64a at n.17 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000)). "'Primary' has been defined as an 'election in which qualified voters nominate or express a preference for a particular candidate or group of candidates for political office . . . ' and 'a preliminary election in which voters nominate party candidates for office." *Washington State Grange v. Locke*, 105 P.3d 9, 20 (Wash. 2004). The purpose of Initiative 872 is to use a primary to select two partisan candidates and present them to the electorate at the general election in order to fill a partisan elective office. J.A. 411-12, 413-14 (Initiative 872, §§ 4, 7(2)).[29] It therefore "nominates" candidates.

When Initiative 872 is examined in the context of Washington's other election laws, it is apparent that candidates using the names of political parties are understood

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[29] Initiative 872 creates a primary, not an election, as Louisiana notes in its amicus brief. Louisiana Br. *Amicus Curiae* 4. A candidate who wins Initiative 872's primary, even one who receives a majority of the vote, must stand for election in November. The circumstances in Louisiana may differ from those in Washington in at least one other respect: Louisiana's political parties apparently do not object to the system as part of their campaign processes. As this Court held in *Tashjian v. Republican Party of Conn.*, a political party has the right to decide how best to advance its interests even where its decisions differ from ones that might be reached by the State or another political party. 479 U.S. 208, 224 (1986).

by all to be party nominees.[30] Those laws and campaign finance regulations are based on the explicit assumption that political parties have nominees on the general election ballot. The support obtained by those nominees is used as the measure whether a party is a major political party, entitled to certain treatment under the campaign finance laws, and entitled to have caucuses in the Legislature who appoint voting members of the State Redistricting Commission. These general election party nominees have to get to the general election ballot somehow. But as the district court concluded: "The State and County Auditors recognize no nomination process for a major party other than by the primary. Under Initiative 872, the only way for a partisan candidate to reach the general election is through the 'top two' primary." Grange Pet. App. 62a (internal citation omitted).

Initiative 872 is a procedure for nominating party candidates for partisan offices for the general election. The Grange may have tinkered with the wording of the definition of "primary" to avoid using the word "nominating," J.A. 412 (Initiative 872, § 5), but word-play in describing the procedure alters neither its underlying substance, nor the constitutional result.

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[30] *See* Statement of the Case, Sections B and C *supra*.

D. The Grange's Additional Arguments Do Not Warrant Creating a "Washington State" Exception to the Principles Affirmed in *Jones*.

The State has a statutory duty to defend Initiative 872,[31] but even it does not join the Grange's remaining arguments. The State's restraint is appropriate. For example, the Grange attempts to overcome the fundamental associational rights articulated in *Jones* with a supposed First Amendment right of a candidate to freely use a party's name on the ballot without permission. No such right is recognized. Nor do general principles of severability or federalism cure the constitutional defects inherent in the Initiative.

1. The Constitution Does Not Afford Candidates Any Right to Force Themselves on Political Parties.

The Grange seeks to transform a *political party's right* to determine the candidates with whom its name will be associated on a ballot into a *candidate's right* to appropriate a party label on election ballots.[32] The Grange argues that because the Democratic Party's name on the ballot conveys information about a candidate's political positions to voters, individual candidates have a right to use the ballot to "tell[] voters important information about him or

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[31] WASH. REV. CODE § 43.10.030.

[32] Grange Br. 23-24 ("If it is unconstitutional for a State to allow a person to make a short statement on the ballot to give voters a piece of information which that person thinks is politically significant about him or her self [sic], then it is equally unconstitutional for a State to allow a political party to make a short statement on the ballot to give voters a piece of information which the party thinks is politically significant about that person.").

her self, such as the name of the political party (if any) that he or she personally prefers." Grange Br. 29. The Democratic Party does not question a political candidate's First Amendment right to express a political viewpoint as part of a campaign for public office. As the Court of Appeals noted, however, this case does not involve "an expression of a party preference *other than as a ballot designation*[.]" Grange Pet. App. 26a (emphasis added).

Political parties have a long-recognized, "inescapably expressive right" to select the standard bearer best able to convey the party's message. *Timmons*, 520 U.S. at 373 (Stevens, J., dissenting). Parties exercise this right by choosing the candidates who will use the party label in their campaigns and on the election ballot. Indeed, a party "use[s] the ballot to communicate information about itself and its candidate to the voters[.]" *Id.* at 363 (majority opinion). "[P]arty labels provide a shorthand designation of the views of *party candidates* on matters of public concern, [and] the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220 (1986) (emphasis added).

This same rationale has never been extended to *a candidate's choice* of a party label. Thus, lower courts have affirmed that the free speech rights of a candidate "do not trump [a party's] right to identify its membership based on political beliefs[.]" *Duke v. Massey*, 87 F.3d 1226, 1232-33 (11th Cir. 1996); *see also Duke v. Cleland*, 954 F.2d 1526, 1530 (11th Cir.), *cert. denied*, 502 U.S. 1086 (1992) (recognizing that a candidate has *no constitutional right* to associate with a political party that is an "unwilling partner"). This Court consistently has established that

ballots are "not . . . a general forum for political expression," but serve only to nominate and elect candidates to office. *Burdick*, 504 U.S. at 445 (Kennedy, J., dissenting), *see also Timmons*, 520 U.S. at 363; *Clingman*, 544 U.S. at 609 (Stevens, J., dissenting).

A holding that the First Amendment provides candidates with a green light to drive their campaigning onto election ballots would "undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising." *Timmons*, 520 U.S. at 365 (recognizing the concern that major party "fusion" candidates could manipulate minor party names to jointly associate themselves with "popular names or catchphrases"). In fact, Washington law prohibits candidates from displaying campaign flyers or other electioneering statements about their political positions inside the voting booth (or anywhere near it). WASH. REV. CODE § 29A.84.510(1)(a). The Grange's assertion that candidates have a right to use ballots to express political viewpoints inside the polling place is contrary to well established prohibitions on electioneering.[33]

The Court of Appeals faithfully adhered to this Court's guidance, affirming that "a statement of party preference on the ballot is more than mere voter information. It represents an expression of partisanship and occupies a privileged position as the only information about the candidates (apart from their names) that appears on the

[33] It is doubtful that Washington voters intended to create such a right. Initiative 872, and all the campaign rhetoric around it in the record of this case, focuses on creating a power in voters to influence the selection of party candidates. Nowhere is any mention made of creating a right in candidates to appropriate party names for their own political use in the polling place.

primary ballot." Grange Pet. App. 20a; *cf. Anderson v. Martin*, 375 U.S. 399, 402 (1964) (by including a candidate's race as a ballot label, "the State indicates [such a consideration] is an important – perhaps paramount – consideration in the citizen's choice").

Moreover, even if, as some lower courts have suggested, a candidate has a First Amendment right to "speak" on the ballot,[34] any limitations on that right represent a *de minimis* burden on speech. The candidate is deprived of the misleading association only at the instant of voting, but has ample alternative means of engaging the electorate.[35] *See Anderson v. Celebrezze*, 460 U.S. 780, 788

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[34] Some lower courts have found that state-imposed restrictions on a candidate's choice of a party label might in some circumstances burden protected speech. In *Rubin v. City of Santa Monica*, the Ninth Circuit found that the plaintiff's speech was impaired by a restriction limiting how he could "designate his occupation on the ballot." *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002). The court, however, determined that such a burden was not severe and ample alternative channels existed, particularly the Candidate Statement, for communicating plaintiff's preferred designation of "peace activist" to the electorate. *Id.* at 1016. In *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), the Sixth Circuit found unconstitutional an Ohio election provision barring a candidate's party designation of "Independent" from ballot. Yet in identifying the right at issue, the court found only that "plaintiffs have established that [Ohio law] burdens the First and Fourteenth Amendment rights of the *supporters* of Independent candidates," and did not reach the rights of candidates themselves. *Id.* at 176 (emphasis added).

[35] The Grange's repeated invocation of this Court decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), is misplaced, as neither the Court of Appeals nor the district court decisions can be seriously described as prohibiting or banning political speech during political campaigns. The factual situation at issue in *White* was whether a Minnesota judicial canon that prevented judges from announcing their views on legal and political issues during their campaigns impermissibly infringed those candidates' First Amendment

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(1983) ("[A]n election campaign is an effective platform for the expression of views on the issues of the day[.]"); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) ("[A]n election campaign is a means of disseminating ideas[.]"). In *Celebrezze*, this Court recognized that through modern political campaigns, the electorate "is informed on a day-to-day basis about events and issues that affect election choices and about the ever-changing popularity of individual candidates." 460 U.S. at 797.

Additionally, the burden, if any, of preventing a candidate from listing a party "preference" on the ballot when the candidate has not been selected by the party must be weighted against the countervailing effects of the impact of that candidate's "preferred" label on both the political party's associational rights and the interests of the voters. "[I]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on the voters." *Id.* at 786 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). Both the Court of Appeals and the district court recognized that inclusion of a candidate's preference "creates the impression of associational ties between the candidate and the preferred party, irrespective of any actual connection or the party's desire to distance itself from a particular candidate." Grange Pet. App. 22a; Grange Pet. App. 68a (the district court concluded that "[a]ny attempt to distinguish a 'preferred'

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freedom of speech. Although this Court found the canon speech ban unconstitutional, *White* does not and cannot be construed as standing for the proposition that candidates have a First Amendment right to drag their campaigns onto the ballot. The issue here is what association may be indicated on the *election ballot*, not what may be said in *public debate*.

party from an 'affiliated' party is unavailing in light of Washington law."). Any burden on a candidate's First Amendment rights is slight when viewed against the substantial burden that Initiative 872 imposes on both the associational rights of unwilling political parties and the false impression conveyed to the voters.

2. Initiative 872 is Not Severable.

The Grange briefly argues that the lower courts should have rewritten Initiative 872 by striking down only a portion of Section 4 of the Initiative. Grange Br. 41-42.

Severability of a state statute is an issue of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 140 (1996). At the outset, Initiative 872 does not contain a severability clause. While this is not dispositive under Washington law, it nonetheless shows the absence of "evidence that the legislature [or the people in their legislative capacity] would have enacted the constitutional portions of a statute without the unconstitutional portions[.]" *United States v. Hoffman*, 116 P.3d 999, 1008 (Wash. 2005) (citing *State v. Anderson*, 501 P.2d 184, 186 (Wash. 1972)).

More significantly, an initiative is not severable if the constitutional and unconstitutional provisions "are so connected that the Legislature would not have passed one without the other, or that the balance is useless to accomplish the legislative purpose." *Priorities First v. City of Spokane*, 968 P.2d 431, 434 (Wash. App. 1998) (citing *Leonard v. City of Spokane*, 897 P.2d 358, 361-62 (Wash. 1995)). The purpose of Initiative 872 was to allow voters to select general election candidates in partisan races. The purpose was not to convert all elected offices in the state to

nonpartisan offices and create conflicts with numerous statutes, regulations and even constitutional provisions.

In *City of Seattle v. Yes for Seattle*, 93 P.3d 176 (Wash. App. 2004), *review denied*, 108 P.3d 1228 (Wash. 2005), the Washington Court of Appeals elaborated on the severability of initiatives. The court concluded that City of Seattle Initiative 80 ("I-80") exceeded the scope of the local initiative power, because it conflicted with Washington State's Growth Management Act. *Id.* at 181.[36] Although initiative supporters urged the court to invalidate only portions of the initiative, the court refused for two reasons.

First, the court explained that "the development aspects of I-80 are pervasive, with most sections of the initiative dealing with development. The non-development sections on their own would not accomplish the goals of the initiative, as development and land use controls play the central role in the initiative." *Id.* at 182. Second, the Court examined the ballot title of the initiative, which it considered "important because 'voters will often make their decision based on the title of the act alone, without ever reading the body of it.'" *Id.* (quoting *Citizens for Responsible Wildlife Mgmt. v. State*, 71 P.3d 644, 653 (Wash. 2003)). The Court concluded that the ballot title "characterize[d] the initiative as primarily concerning development." *Id.*; *see also United States v. Manning*, 434 F. Supp. 2d 988, 1023 (E.D. Wash. 2006) (striking down

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[36] Under the Washington Constitution, initiatives that exceed the scope of the initiative power are invalid. *See, e.g., Philadelphia II v. Gregoire*, 911 P.2d 389, 393 (Wash. 1996). In *Yes for Seattle*, the court held that I-80 exceeded the initiative power because it interfered with development regulation functions delegated exclusively to local legislative bodies. 93 P.3d at 180-81.

Washington Initiative 297 in its entirety because, *inter alia*, severability would undermine the "primary" purpose of the initiative).

Both of these reasons apply equally to Initiative 872. Carefully crafted words in Initiative 872's ballot title[37] confirmed to voters that primary ballots would continue to indicate political parties along with candidates:

> **Ballot Title**
> Initiative Measure 872 concerns elections for *partisan* offices.
>
> This measure would allow voters to select among all candidates in a primary. Ballots would indicate candidates' party preference. The two candidates receiving most votes advance to the general election, regardless of party.

J.A. 400 (emphasis added). "[W]ords in a title must be taken in their *common and ordinary meanings*, and the legislature cannot in the body of an act impose another or unusual meaning upon a term used in the title without disclosing such special meaning therein." *Locke*, 105 P.3d at 18.

In urging severability, the Grange would leave fragments of Initiative 872 on the books but remove a cardinal enticement to the people's passage of the measure – that candidates for partisan office would "continue" to designate their party. J.A. 169. Moreover, although the Grange asks this Court to sever only section four of Initiative 872, virtually the entire Initiative references and incorporates

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[37] The ballot title for an Initiative is limited to ten words and the description is limited to thirty words. WASH. REV. CODE § 29A.72.050.

the candidates' party designation. *See* Grange Pet. App. 88a-89a (citing Initiative 872, §§ 4, 5, 7(2), 7(3), 9(3), 11, 12). As the district court correctly concluded, deleting each of these sections "would eliminate any reference to party preference or affiliation, and would convert a partisan election process into a nonpartisan election process." Grange Pet. App. 89a. The lower courts properly declined the Grange's suggestion to sever Initiative 872 beyond recognition.

3. "Laboratories of Democracy" May Not "Experiment" With Abridging the Core Freedoms That Make Democracy Possible.

Finally, the Grange argues that this Court must uphold Initiative 872 in order to protect the right of States to act as laboratories of democracy and to conduct social and economic experiments. Grange Br. 43-45. The Fourteenth Amendment was passed, however, precisely to prevent States from conducting social experiments that invade rights protected by the United States Constitution. The rights at issue in this case are protected against State mandated social experiments such as Initiative 872 because these rights buttress the core principles of American democracy:

> Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. . . . Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "select[s] a standard bearer who best represents the party's ideologies and preferences."

Jones, 530 U.S. at 574.

Neither the decisions below, nor Respondents have suggested – as the Grange would have this Court believe – that federalism "prohibits Washington from adopting a primary system different from . . . other States." Grange Br. 47. Washington may adopt any primary system it chooses, *provided* the system respects constitutional rights:

> A State's broad power to regulate the time, place, and manner of elections 'does not extinguish the State's responsibility to observe the limits establish by the First Amendment rights of the State's citizens.'

Eu, 489 U.S. at 222 (quoting *Tashjian*, 479 U.S. at 217). Of course, "when States regulate parties' internal processes, they must act within the limits imposed by the Constitution." *Jones*, 530 U.S. at 573; *see also Chandler v. Miller*, 520 U.S. 305, 324 (1997) (Rehnquist, C.J., dissenting) (recognizing that "novel experiments, of course, must comply with the United States Constitution").

To the extent Initiative 872 is an experiment, it is an experiment in giving the State the power to force a political party to change its message. It is an experiment in giving the State the power to suppress views that do not conform to mainstream opinion. It is an experiment in giving the State the right to dictate who is (and who is not) associated with a political party. In short, Initiative 872 is not an experiment that federalism is intended to protect: it is an experiment that federalism is intended to restrain. Regardless, the Grange cannot save an otherwise unconstitutional initiative simply by labeling it an "experiment."

CONCLUSION

The most basic symbol possessed by a political party is its name. Generations of citizens have breathed meaning into that symbol with their labor, their dollars, and their voices. No one – and certainly not the State – should be given the right to hijack that symbol. This Court should affirm the reasoned decisions of district court and the Court of Appeals, and declare Initiative 872 unconstitutional.

Respectfully submitted,

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NO. 06-730

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON; ET AL.,

Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY;
WASHINGTON STATE GRANGE; ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONSE BY RESPONDENT WASHINGTON STATE GRANGE IN SUPPORT OF PETITION

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QUESTION PRESENTED FOR REVIEW

As stated in the Washington State Grange's pending Petition arising from the same Ninth Circuit decision (Supreme Court No. 06-713), the question presented by these Petitions for review is as follows:

In *California Democratic Party v. Jones*, 530 U.S. 567, 585-586 (2000), this Court specified how States could structure a top-two primary system that does not violate the associational rights of a political party. Pursuant to the Initiative power which the People of the State of Washington reserved to themselves in their State Constitution, the voters of the State of Washington enacted a top-two primary law that the Washington State Grange had drafted to comply with this Court's ruling in *Jones*. That law makes the State primary a contest to select the two most popular candidates for the November ballot – regardless of party nominations or party selection. That law also allows candidates for certain offices to disclose on the ballot the name of the party (if any) which that candidate personally prefers.

The Ninth Circuit invalidated this top-two primary system in its entirety, holding that the First Amendment (applied to the States through the 14th Amendment) prohibits a State from so allowing a candidate to disclose the name of the party he or she personally prefers on the ballot.

Question Presented: Does the First Amendment prohibit top-two election systems that allow a candidate the freedom to disclose on the ballot the name of the party he or she personally prefers?

NOTICE OF RELATED PETITION

The Washington State Grange, named as a "Respondent" in this Petition (No. 06-730), has a related Petition pending before this Court. That Petition arises out of the same Ninth Circuit decision, and bears the No. 06-713.

The Washington State Grange and State were both aligned as a Defendant-Intervenors in the district court and as Appellants in the Ninth Circuit.

The Washington State Grange files this Response in support of the State's related Petition pursuant to Supreme Court Rule 12.6.

REASONS FOR GRANTING THE STATE OF WASHINGTON'S PETITION

The Washington State Grange's pending Petition details why its Petition — and thus the State's Petition as well — should be granted.

In short, this case concerns the lifeblood of democracy in our country: State-run elections. And its central issue boils down to the fundamental distinction between two First Amendment rights: a political party's associational right to control the selection of the name of the person who is that party's ***nominee***, and a political candidate's free speech right to state the name of the party he or she personally ***prefers***.

This Court should grant review of the State's (and the Washington State Grange's) Petitions because the Ninth Circuit's decision below ignores that fundamental distinction. Instead:

(1) The Ninth Circuit's decision contradicts this Court's ruling in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). Under the Ninth Circuit's decision, a top-two primary system is unconstitutional if it allows a party's name to appear on the ballot – even when that system has the nonpartisan result of selecting the top two vote getters over all regardless of any party's name.

(2) The Ninth Circuit's decision turns this Court's First Amendment jurisprudence on its head. Under the Ninth Circuit's decision, the First Amendment is a gag that prohibits States from allowing candidates to provide voters a highly relevant piece of information about themselves on the ballot. In this case, the piece of information is a statement by the candidate disclosing to voters the name of the political party (if any) which that political candidate prefers.

(3) The Ninth Circuit's decision disregards our Constitution's fundamental principles of separation of powers and federalism. The Ninth Circuit panel in this case reached out and struck down a voter-approved State law on a State issue (State-run elections) by resorting to a hypothetical about a politician who "might" not be candid and speculation that some State voters "may" not understand the meaning of the "preference" statement allowed by the Initiative measure they overwhelmingly voted to enact.

(4) The Ninth Circuit's decision has immediate nationwide significance even beyond the 59 million Americans who live within the Ninth Circuit's geographic dominion. That is because the political parties insist that the Ninth Circuit's decision also makes the

"Montana" system currently used in a dozen States unconstitutional.

Lastly, the Washington State Grange notes that, apparently due to a computer processing or printing glitch, the text of the State enactment at issue (Initiative 872) in the Appendix to the State's Petition in this Case No. 06-730 inadvertently omits the strike-outs and underlining as they appeared in that measure to show the deletions and additions made by that law. The text of Initiative 872 in the Appendix to the Washington State Grange's Petition in Case No. 06-713, however, contains those strike-outs and underlines as they appeared in the Initiative enacted by Washington's voters.

CONCLUSION

For the reasons summarized above and fully stated in the Washington State Grange's related Petition, the Washington State Grange supports this Court's granting the State's Petition along with the Grange's previously filed Petition in Case No. 06-713.

RESPECTFULLY SUBMITTED.

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December 16, 2006

Nos. 06-713 and 06-730

In The Supreme Court of the United States

WASHINGTON STATE GRANGE,

Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY, ET AL.; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, ET AL.; LIBERTARIAN PARTY OF WASHINGTON STATE, ET AL.,

Respondents.

STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY, ET AL.; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, ET AL.; LIBERTARIAN PARTY OF WASHINGTON STATE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

May Washington State force the Republican Party to associate, on election ballots, the official Voters' Pamphlet and other State-mandated disclosures, with any candidate who self-selects the Republican Party as his "preference"?

May Washington State continue the same state conduct previously held to violate the federal Constitution and defeat the First Amendment right of the Republican Party to select its standard bearers, its "ambassadors to the general electorate," by making minor cosmetic changes to its election statutes?

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STATEMENT OF THE CASE

This case, once again, directly presents the question whether the First Amendment permits a state to re-define the scope of the Republican Party's association at the crucial moment of choosing the Party's standard bearers for the general election. Initiative 872 ("I-872") established a partisan primary that forces the Republican Party to be associated with any candidate seeking to use the Republican Party name to advance his candidacy, whether or not the Republican Party desires to associate with that candidate. I-872 also forces the Republican Party to have its standard bearers for the general election chosen by all voters, including supporters of rival parties. I-872's purpose was to alter the Republican Party message and messenger, in effect continuing Washington's prior, unconstitutional blanket primary by "restor[ing] the kind of choice that voters enjoyed for seventy years with the blanket primary." Official Voters' Pamphlet "Statement For" I-872, JA 407. *See also* "Yes on I-872" home page, JA 79. The following key features of the blanket primary were replicated by I-872:

	Former Blanket Primary	**I-872**
The Republican Party must nominate its candidates in the primary election.	WASH. REV. CODE § 29.30.095 (2002)	§ 7(2), JA 413
Voters can vote for any candidate for each office without limitation on party affiliation.	WASH. REV. CODE § 29.18.200 (2002)	§ 5, JA 412
Candidates are identified on the ballot by party affiliation.	WASH. REV. CODE § 29.30.020(3) (2002)	§ 4, JA 412; § 7(3), JA 414

The courts below held that the partisan primary established by I-872 violates the First Amendment. The district court held that I-872 is constitutionally indistinguishable from the partisan blanket primaries declared unconstitutional by this Court in *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*Jones*") and the Ninth Circuit in *Democratic Party of Wash. v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213, *cert. denied sub nom., Wash. State Grange v. Wash. State Democratic Party*, 541 U.S. 957 (2004) ("*Reed*"):

> In all constitutionally relevant respects, Initiative 872 is identical to the blanket primary invalidated in *Reed*: (1) Initiative 872 allows candidates to designate a party preference when filing for office, without participation or consent of the party; (2) requires that political party candidates be nominated in Washington's primary; (3) identifies candidates on the primary ballot with party preference; (4) allows voters to vote for any candidate for any office without regard to party preference; (5) allows the use of an open, consolidated primary ballot that is not limited by political party and allows crossover voting; and (6) advances candidates to the general election based on open, "blanket" voting.

Pet. App. 72a (footnote marker omitted).[1] The court held that I-872 was not a "nonpartisan blanket primary" under *Jones*, because I-872 continues to select political party nominees. Pet. App. 71a.

The district court also invalidated the candidate filing provisions of I-872 that forced the Republican Party to be

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[1] Citations to "Pet. App." are to the Appendix to the petition of the State of Washington.

associated on the ballot with any candidate who self-designates the Republican Party as representing of his beliefs and policies, holding the statute violated the Party's right of association under the First Amendment. Pet. App. 79a. Applying the same test as Washington courts, the court rejected petitioners' argument that the partisan features of I-872 could be severed from the remainder of the initiative. Pet. App. 89a. The court entered a permanent injunction against implementation of I-872.[2] Pet. App. 93a-96a.

The court of appeals affirmed, concluding that a candidate's ability to "self-identify with a particular party regardless of that party's willingness to be associated with that candidate" constituted a severe burden on the political parties' associational rights. Pet. App. 3a-4a. The court rejected petitioners' assertions that I-872 established a "nonpartisan" blanket primary because "[b]y including candidates' self-identified political party preferences on the primary ballot, Washington permits all voters to select individuals who may effectively become the parties' standard bearers in the general election." Pet. App. 19a.

The court of appeals noted that the State and Grange argued that I-872 did not severely burden the parties' associational rights and never "articulated any compelling state interest" that would justify a severe burden. Pet.

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[2] The district court did not reach the Republican Party's claim that I-872 violates the Equal Protection Clause, concluding that the initiative impliedly repealed other provisions of state law that enabled each minor party to prevent more than one candidate for each office to appear on the primary ballot under its party name. Pet. App. 80a-84a. The court also did not reach claims that I-872 unconstitutionally restricted political party access to the ballot. Pet. App. 84a. In addition, the court reserved ruling on the political parties' "as applied" challenge. Pet. App. 53a.

App. 30a. Any compelling interests that could be implied were essentially the same as those rejected in *Jones* and could be served through alternative, more narrowly tailored provisions. *Id.* Like the district court, the court of appeals applied Washington's severance test, concluding "it cannot reasonably be believed" that I-872 would have been adopted absent the pervasive partisan identification provisions. Pet. App. 32a. The court rejected petitioners' argument that Washington voters intended to convert Washington's state and federal offices to "nonpartisan." Pet. App. 32a-33a.

Historical Development of Washington's Partisan Primary System

Since statehood, Washington's legislative branch and most executive branch offices have been "partisan" offices.[3] At the time of statehood, candidates for partisan office in Washington were nominated by party caucus or convention. Since statehood, the printing and distribution of election ballots has been controlled by the State. *See* 1889-90 WASH. LAWS, ch. XIII, p. 405, § 15. Washington's first legislature authorized parties to nominate by convention or primary, and to establish requirements for voter participation in the primary over and above the prerequisites for voting in general. 1889-90 WASH. LAWS, ch. XIII, p. 400, § 2; pp. 419-22, §§ 1-4, 6.

In 1907, Washington enacted legislation requiring nomination of candidates for public office by public primary. The statute recognized that absent the primary law,

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[3] Until 1907, the state Supreme Court was also a partisan office. 1907 WASH. LAWS, ch. 209, § 4. The state Superintendent of Public Instruction is nonpartisan. WASH. REV. CODE § 29.30.085(2) (2002); I-872, § 4(2), JA 412.

a political party had the inherent power to nominate as it saw fit. Although the primary law limited that authority, it reserved to the political parties "the power to . . . perform all other functions inherent to such organizations, the same as though this act had not been passed: *Provided*, That in no instance shall any convention have the power to nominate any candidate to be voted for at any primary election." 1907 WASH. LAWS, ch. 209, § 22.

The 1907 primary law was challenged based on adding voting qualifications to those set forth in Washington's constitution. Washington's Supreme Court upheld the law because a voter could be required to declare his intention "to affiliate with the party whose ballot he demands . . . and . . . to support generally the candidates of that party." *State ex rel. Zent v. Nichols*, 97 P. 728, 731 (Wash. 1908). The affiliation requirement did not add voting qualifications because "it is not the purpose of the primary election law to elect officers. The purpose is to select candidates for office to be voted for at the general election. Being so, the qualifications of electors provided by the constitution for the general election can have no application thereto." *Id.*

In 1935, petitioner Grange sponsored an initiative to the legislature to implement a "blanket primary." The blanket primary allowed "all properly registered voters to vote for their choice at any primary election for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter." *History of the Blanket Primary in Washington*, http://secstate.wa.gov/elections/bp_history.aspx (last visited July 17, 2007). After adoption in 1935, Washington used the blanket primary until 2004.

In 2000, this Court invalidated California's blanket primary in *Jones*. Much of the evidence on the operation and effect of the blanket primary was drawn from Washington, including testimony that 25% of party voters cross over to another party's primary and that two-thirds to three-quarters of all voters split their ticket in the primary, selecting the Republican standard bearers in some races and the Democratic standard bearers in others. There was also substantial evidence introduced regarding the adulteration of political party message resulting from the blanket primary. *See Jones*, 530 U.S. at 578-580.

The Republican Party has adopted rules for the qualification of candidates to file under the Republican name and concerning participation of voters in nominating Republican candidates. The rules in effect at the time this litigation commenced require that any primary that "has the effect of nominating a candidate of the Republican Party" must be limited to Republican and unaffiliated voters, and prohibit crossover voting in the primary. Rule 1, JA 89. In the absence of a qualifying primary to nominate Republican candidates, the rules provide for a nominating convention. Rule 16, JA 95. Only candidates certified or nominated by the Republican Party are authorized to designate themselves as Republican candidates or appear as Republicans "on the election ballot or in other election documents." Rule 30, JA 102.

Following *Jones*, the Ninth Circuit struck down Washington's prior blanket primary in *Reed*. The State defended the primary, asserting that it was a nonpartisan blanket primary as described in *Jones*. The *Reed* court stated:

> As for the State of Washington's argument that the party nominees chosen at blanket primaries are the nominees not of the parties but of the

> electorate, that is the problem with the system, not a defense of it. Put simply, the blanket primary prevents a party from picking its nominees.

343 F.3d at 1204.[4] The Ninth Circuit held that "the Washington blanket primary system is materially indistinguishable from the California blanket primary system" held unconstitutional in *Jones*." *Id.*

In 2004, Washington's legislature adopted a "modified" blanket primary. E.S.B. 6453, 58th Leg., Reg. Sess. (Wash. 2004), JA 425-579. The bill included an alternate Montana-style open primary, to be effective if a court invalidated the modified blanket primary. JA 489. On April 1, 2004, Washington's governor partially vetoed the legislation, noting that the modified blanket primary would substantially restrict voter choice at the general election, in which voter participation was approximately double that of the primary election. JA 574-75. The governor also concluded that the "top two" component of the modified blanket primary would "effectively den[y] [minor parties] access to the general election ballot." JA 575. That same day, petitioner Grange issued a press release launching the campaign for I-872 "in response to Gov. Locke's partial veto of Engrossed Senate Bill 6453, which . . . would have put a top-two system in place." JA 798. The Grange described I-872 as instituting "a '*modified*' blanket primary system . . . in which *voters will not be restricted to choosing among the candidates of only one party* in a primary election." *Id.* (emphasis added).

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[4] In this case the State similarly asserts that "candidates who appear on the general election ballot are selected by the *voters at large*, not by the parties or by the voters as party members." JA 388 (emphasis in original).

SUMMARY OF ARGUMENT

Political parties have the First Amendment rights to define the scope of their political association, select their standard bearers for the general election, and exclude outsiders from that process. I-872's plain language violates those rights, declaring that every voter has a "fundamental right" to select party standard bearers "without any limitation based on party preference or affiliation, of either the voter or the candidate." I-872, § 3(3), JA 411. This Court rejected the "desire" to select standard bearers of a party to which a voter does not belong as a "right," ruling that it "falls far short of a constitutional right, if indeed it can even fairly be characterized as an interest," and provides no "basis for disregarding the First Amendment right to exclude." *Jones*, 530 U.S. at 573 n.5. I-872 further violates core rights of political association by forcibly associating the Republican Party on the State's election ballots with any candidate who self-selects the Republican Party as his "preference."

Washington's modified blanket primary unquestionably selects the Republican Party's standard bearers for the general election. It is the only partisan nomination process the State recognizes. JA 104-111. It forces the Republican Party to associate on the ballot with any candidate who seeks to appropriate the Party's name. I-872, § 4 (candidate name must be listed "in conjunction" with the Republican Party), JA 412. It forces the Republican Party to have its standard bearers selected by voters who do not share the party's policies or principles. *Id.*, § 5, JA 412.

Petitioners cannot avoid the real world association I-872 creates between candidates and the political party for which they express "preference." Washington defends I-872 as advancing the interests of voters who "may wish

to support a variety of candidates for different offices who may be *associated with two or more parties*." State Br. at 29-30 (emphasis added). The Grange likewise admits the connection between party and candidates: under I-872, "we could even see more *minor party candidates* for legislative offices." JA 66 (emphasis added). At the general election, "the voter might be presented with a choice . . . between two candidates *of the same political party*." JA 170 (emphasis added).

I-872 clearly intended to overrule the fundamental holding of *Jones* and constitutes nothing less than an effort at legislative nullification of this Court's First Amendment precedents. Its declaration of "legislative intent" even invokes the old, unconstitutional blanket primary as a system that "allow[s] the broadest possible participation in the primary election; . . . giving each voter a free choice among all candidates in the primary." I-872, § 2, JA 411. Referring to *Reed*, I-872 further states: "The Ninth Circuit Court of Appeals has threatened [the blanket primary] system through a decision, [sic] that, if not overturned by the United States Supreme Court, may require change." *Id.* In its press release announcing the I-872 campaign, the Grange explained that its "initiative will put a system in place which *looks almost identical* to the blanket primary system we've been using for nearly 70 years." JA 798 (emphasis added).

This Court has previously faced legislative sleight-of-hand in varied contexts: the "White primary" cases, a state statute that provided "information about candidate race," term limits, and declarations of secular purpose regarding religious instruction in public schools. In every instance, the Court rejected legislative evasion of constitutional protections, whether by functionally identical, racially

exclusive primaries or sham assertions of legislative purpose.

I-872, by both express intent and operation, selects the candidates who will carry the Republican Party's standard and message to Washington's voters in the general election. I-872 impermissibly shifts the ability to define the scope of the Republican Party's political association away from the Party to any candidate who wants to appropriate the Republican Party name to advance his candidacy, and to unaffiliated and rival-party voters. In each instance, I-872 violates the Party's First Amendment right to define the scope of its political association at the critical juncture of selecting its standard bearers for the general election. The rules adopted by the Republican Party governing candidate eligibility and prohibiting crossover and rival-party voting in the primary are designed to advance its policies and programs. This Court's precedents clearly prohibit a state from forcing inclusion of potentially adverse persons or messages in an expressive association.

ARGUMENT

1. Washington's modified blanket primary imposes a severe burden on core First Amendment rights of political association by denying the Republican Party the ability to define the scope of its political association at the critical juncture when its standard bearer for the general election is chosen.

The First Amendment protects "the freedom to join together in furtherance of common political beliefs, which necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association

to those people only." *Jones*, 530 U.S. at 574 (internal quotation marks and citations omitted). This freedom is an indispensable element of representative democracy. *Id.* From statehood, Washington's political parties have filled this critical role by promoting policies, recruiting candidates, and mobilizing voters. *See, e.g.*, CHARLES H. SHELDON, A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT 66 (Univ. Wash. Press 1988).

Selecting a candidate to advance a political party's program for governance is its fundamental purpose. This Court has consistently held that "the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences,'" *Jones*, 530 U.S. at 575 (internal citation omitted), is "the 'basic function of a political party.'" *Id.* at 581 (internal citation omitted). "There is simply no substitute for a party's selecting its own candidates." *Id.* at 580-81. I-872 forces the Republican Party to associate on the primary and general election ballots with any candidate who expresses a "preference" for the Party, even when the Party may not "prefer" that candidate. *See* I-872, §§ 4, 7(3), 9(3), JA 412, 414-15.

This Court made clear that the First Amendment precludes a state from substituting its judgment for the party's in selecting the party's standard bearer for the general election.

> Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "selects a standard bearer who best represents the party's ideologies and preferences." *Eu*, 489 U.S. at 224 (internal quotation marks omitted). The moment of choosing the party's nominee, we have said, is "the

> crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian*, 479 U.S. at 216; *see also id.* at 235-236 (Scalia, J., dissenting) ("The ability of the members of the Republican Party to select their own candidate . . . unquestionably implicates an associational freedom"); *Timmons*, 520 U.S. at 359 ("The New Party, and not someone else, has the right to select the New Party's standard bearer" (internal quotation marks omitted)); *id.* at 371 (Stevens, J., dissenting) ("The members of a recognized political party unquestionably have a constitutional right to select their nominees for public office").

Jones, 530 U.S. at 575-76.

A political party's candidate is its "ambassador to the general electorate in winning it over to the party's views." *Jones*, 530 U.S. at 575. The Republican Party's programs for governance may only be implemented by electing candidates who adhere to its principles and programs. This Court has also recognized the symbiosis between party positions and party candidates. The nomination "process often determines the party's positions on the most significant public policy issues of the day." *Id.* It is for those reasons that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Id.* "There is no question about the closeness of candidates to parties. . . ." *FEC v. Colo. Republican Fed. Campaign Comm'n*, 533 U.S. 431, 449 (2001).

Washington's modified blanket primary shares the same goal as California's blanket primary – changing the identity of the Republican Party's standard bearer, and thereby its message. The promoters of the California

blanket primary described it as a "a measure that would weaken party hard-liners and ease the way for moderate problem-solvers." *Jones*, 530 U.S. at 569 (internal quotation marks omitted). The Grange explained I-872's intent to change both the Republican message and messenger. I-872 would be

> more likely to produce public officials who represent the political preferences and opinions of a broad cross-section of the voters. Candidates will need to appeal to all the voters, partisan and independent alike. They will not be able to win the primary by appealing only to party activists. . . . The qualifying primary gives voters the kind of control that they exercised for seventy years under the blanket primary.

JA 78-79. The official Voters' Pamphlet confirmed that "[p]arties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters," JA 406, and that "I-872 will restore the kind of choice in the primary that voters enjoyed for seventy years with the blanket primary." JA 407. These objectives do not justify the intrusion of I-872 on the freedom of political association to which the parties are entitled. The State has no business trying to promote candidates favored by the broad middle any more than promoting leftist or rightist candidacies. A party has a constitutional right to take positions or promote candidates that may be unpopular at the moment, but in which the party believes. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 227-28 (1989).

The modified blanket primary is unconstitutional for the same reason as the blanket primaries in *Jones* and *Reed* – it deprives Republicans of control over the identities of their standard bearers and the content of their message.

a. I-872's modified blanket primary is a partisan primary that selects the Republican Party standard bearers for the general election.

I-872's modified blanket primary is expressly a partisan nominating process that selects the Republican Party standard bearers for the general election. I-872 is not the nonpartisan blanket primary discussed in *Jones* because it resolves intraparty competition in a state-mandated primary. The State has admitted that the modified blanket primary selects political party standard bearers, describing the presence of two self-designated Republicans in the general election as "politically interesting, both for Republicans and for Democrats (who have no standard bearer in such an election)." JA 392.

The State now argues that I-872 does not select party standard bearers in the general election because there may be two Republicans and no Democrats on the general election ballot. State Br. at 43. I-872 still nominates Republican standard bearers, even if in some races it may nominate two. There is no constitutional distinction between rival-party voters nominating one, two or more Republican candidates. Washington's constitution recognizes that a party may have more than one nominee for office. *See* WASH. CONST. art. II, § 15 (permitting the Republican Party to "*nominate*" three candidates to fill a vacancy in partisan office that had been held by a Republican).

Operationally, I-872 is indistinguishable from Washington's former blanket primary, as its sponsors intended. The sponsor announced that I-872 would "*preserve* [Washington's] primary system." JA 792 (emphasis added). It would look and operate much like the former blanket primary. JA 68-69, 77 (I-872 "establishes a qualifying primary which will give voters the freedom they enjoyed

under the blanket primary – to vote for any candidate they prefer for each office"). I-872 is not a nonpartisan blanket primary. It is the old, unconstitutional blanket primary repackaged with a different name, "[a]n old pattern in new guise." *Terry v. Adams*, 345 U.S. 461, 480 (1953) (Clark, J., concurring) (invalidating "Jaybird primary" which continued practice of excluding voters based on race).

Under Washington law, I-872 must be viewed in its statutory context. "A court's objective in construing a statute is to determine the legislature's intent." *Tingey v. Haisch*, 152 P.3d 1020, 1023 (Wash. 2007). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* (alteration in original) (internal quotation marks and citation omitted). Plain meaning is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Id.* If the statutory language remains susceptible to more than one reasonable interpretation, the statute is considered ambiguous, and the court may then employ statutory construction tools, including legislative history, for assistance in discerning legislative intent. *Id.*

Political party affiliation permeates I-872. Eight of its eighteen sections address candidates' "party preference" or affiliation. I-872, §§ 3, 4, 5, 7, 9, 11, 12, 15, JA 411-12, 414-15, 417, 419. The definition of "primary election" expressly recognizes that both candidates and voters have "party preference or affiliation." *Id.*, § 5, JA 412. The partisan identification selected by a candidate is "for the information of voters." *Id.*, § 7(3), JA 414. If a candidate selects the Republican Party as his "party preference," the Party name must appear "in conjunction with" the candidate on

both the primary and general election ballots. *Id.*, § 4, JA 412. The importance of the party affiliation features is buttressed by the State's emergency regulations that prohibit a candidate from changing "party preference" between the primary and general election. WASH. ADMIN. CODE 434-230-040 (2005), JA 601.

I-872 substitutes "preference" for "designation" in the candidate filing statute. *Id.*, § 9(3), JA 415. Petitioners contend that a candidate's "party preference" connotes no affiliation or association with a political party, but rather has a special, limited meaning. State Br. at 23-24; Grange Br. at 38-39. I-872 contradicts this assertion, recognizing that candidates elected as Republicans are "of" the Republican Party: "If a vacancy occurs in any legislative office . . . , the term of the successor who is *of the same party* as the incumbent may commence. . . ." I-872, § 15(2) (emphasis added), JA 419. The assertion that "party preference" has a special meaning is further undercut by I-872's use of "preference" interchangeably with "status" and "designation" in connection with "independent" candidates. *Compare id.*, § 7(3) ("independent preference") *with id.*, § 9(3) ("independent status"), § 11 ("independent status"), and § 12 ("independent designation"), JA 414-15, 417. "Where . . . a statute fails to define a term, rules of statutory construction require us to give the term its plain and ordinary meaning, which we derive from a standard dictionary if possible." *McClarty v. Totem Elec.*, 137 P.3d 841, 849-50 (Wash. 2006). The common, dictionary meaning of "preference" is "1a. The selecting of someone or something over another or others. b. The right or chance to so choose. c. Someone or something so chosen. See synonyms at choice." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). "Party preference" is "party selection" or "party choice" and is functionally

identical to "party designation."[5] The Grange itself treated the terms "preference" and "designation" as interchangeable and a continuation of past practice in its campaign for I-872: "[C]andidates will *continue* to express a political party *preference* when they file for office and that *designation* will appear on the ballot." JA 169 (emphasis added).

I-872's partisan primary was grafted onto a wider body of law under which "Republican" candidates are representatives of the Republican Party. For example, Washington's Constitution recognizes the association between successful Republican candidates and the Republican Party. It authorizes the Party to nominate the successors to public officers elected under the Republican banner:

> [T]he person appointed to fill the vacancy must be from . . . the same political party as the legislator or partisan county elective officer whose office has been vacated, and shall be one of three persons who shall be nominated by the county central committee of that party. . . .

WASH. CONST. art. II, § 15. "Major political party" status depends "at least one nominee for president, vice president, United States senator, or a statewide office receiv[ing] at least five percent of the total vote cast." WASH. REV. CODE § 29A.04.086 (2006). A legislator's ability to raise campaign money depends, in part, on being one of the "members of a major political party in the state senate

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[5] Other election-related statutes use "preference" and "designation" as equivalents. *See, e.g.*, WASH. REV. CODE § 42.17.510(1) (2006) ("For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, that party or independent designation shall be clearly identified in electioneering communications, independent expenditures, or political advertising.").

or state house." WASH. REV. CODE § 42.17.020(10) (2006); *see also* WASH. REV. CODE § 42.17.640 (2006). Before the primary, local election officials are required to publish notice of the election, which must contain "the proper party designations" of the candidates. WASH. REV. CODE § 29A.52.311 (2006).

A candidate who appears on the general election ballot as a Republican is to the public, inevitably, the Party's standard bearer. It is immaterial that I-872 avoids using the terms "nominate" or "nominee." In *Jones*, the Court used interchangeably the phrases "selecting a candidate," "selecting a nominee," "selecting a standard bearer," and "choosing a leader." According to the State, I-872 does not "choose a party's nominee" because it separates "the process of choosing party candidates from the process of winnowing the field of candidates who can participate in the general election." State Br. at 30; *see also id.* at 38, 41. The initiative, however, is the only mechanism for "winnowing" the field of potential Republican standard bearers to the candidates who represent the Party and its programs to the electorate in November. State election officials admitted that under I-872, there is no "partisan nomination process separate from the primary." JA 104-11.

This case is not the first time the State has argued that Washington's primary election system is nonpartisan or does not select party nominees. It is the third, and the argument has been rejected both times before. In its *amicus curiae* brief before this Court in *Jones*, the State described "the winnowing of candidates for the general election" as the only "aspect of party associational activities affected by the blanket primary." Brief of the States of Washington & Alaska as *Amicus Curiae* in Support of Respondents, 1999 U.S. Briefs 401 at *10. In *Reed*, the

State argued that Washington's prior blanket primary was the nonpartisan primary of *Jones* and distinguishable from California's invalidated primary:

> First, California registers voters by party but Washington does not. Second, . . . because of its non-partisan registration, the winners of the primary "are the 'nominees' not of the parties but of the electorate." Thus, . . . its primary is a "*nonpartisan* blanket primary" that under *Jones* does not violate the parties' associational rights.

Reed, 343 F.3d at 1203 (internal citations omitted) (emphasis in original). The Ninth Circuit characterized these as "distinctions without a difference," *id.*, and observed:

> As for the State of Washington's argument that the party nominees chosen at blanket primaries "are the 'nominees' not of the parties but of the electorate," that is the problem with the system, not a defense of it. Put simply, the blanket primary prevents a party from picking its nominees.

343 F.3d at 1204 (internal citation omitted).

The modified blanket primary is a partisan nominating process that follows the former blanket primary in "prevent[ing] a party from picking its nominees." Voters of any political party, including those antagonistic to the Republican Party, remain free to vote for candidates identified as Republican on the ballot and determine which Republican candidates advance to the general election. This directly contravenes the Republican Party's rules, which limit participation in "any primary which has the effect of nominating a candidate of the Republican Party" to voters who affirmatively affiliate by requesting a Republican ballot. Rule 1, JA 89. I-872 authorizes opportunistic or hostile candidates to use the Republican Party

name to advance their candidacies, whether or not they share the principles of the Party.

The participation of hostile voters is the precursor harm. The greater harm is saddling the Republican Party with a standard bearer who does not share its values. "[A] single election in which the party nominee is selected by nonparty members could be enough to destroy the party. . . . Ordinarily, however, being saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it." *Jones*, 530 U.S. at 579.

b. Washington's candidate filing statute impermissibly shifts the ability to define the Republican Party's political association away from the Party to any candidate who chooses to associate the Republican Party with him on the ballot.

The modified blanket primary allows any candidate to declare himself a "Republican" and forces the Republican Party to associate with every candidate who wants to use the Republican Party name to advance his candidacy. *See* I-872, § 4, JA 412. The association of candidate and party under I-872 cannot be avoided by verbal sleight-of-hand – the State lists both real Republican candidates and those expressing a "preference" for the Party as Republicans. *Id.*, § 4 (primary and general election ballots), JA 412; § 11 (State Voters' Pamphlet), JA 417. The state attorney general's official description of I-872 makes no distinction between candidates expressing a "party preference" and "real" party candidates. They are all "party candidates": "The primary ballot would include . . . major party and minor party candidates and independents." JA 405. Under

Republican Party rules, only candidates certified to a qualifying party primary or candidates nominated by convention in the absence of a party primary may appear on the ballot or in election documents under the Republican Party's name. Rule 30, JA 102. Forced association between a candidate and the Party on official ballots or other publicly-funded election materials is no less a violation of the Party's First Amendment right to exclude than is forced association with voters.

It is essential that the Party be able to exclude candidates who are hostile or indifferent to its principles at the "moment of choosing the party's nominee, [which] is 'the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.'" *Jones*, 530 U.S. at 575 (internal citation omitted). Because the nominee "becomes the party's ambassador to the general electorate," a state's regulation of "the identity of the party's leaders . . . may . . . color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Jones*, 530 U.S. at 575, 579 (internal quotation marks and citation omitted).

This Court has repeatedly declared that a state cannot compel a group to associate with other speech or speakers. *See, e.g., Pacific Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). *Pacific Gas* struck down California's requirement that a private company, which discussed political issues in newsletters sent with its monthly billing envelopes, provide access to its envelopes for a third party's political speech. A plurality of the Court stated that "[c]ompelled access . . . both

penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." 475 U.S. at 9. California's order to disseminate the third-party's speech "in envelopes that [the company] owns and that bear [its] return address," *id.* at 18, forced "association with speech with which [the company] may disagree." *Id.* at 15.

In *Hurley*, Massachusetts asserted that its public accommodation law required a private parade organizer to include a gay, lesbian, and bisexual group in a St. Patrick's Day parade. The Court held that compelling the group's inclusion "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." 515 U.S. at 573.

Similarly, the Court ruled the Boy Scouts could not be forced to include a homosexual activist as an assistant scoutmaster in *Dale*. Giving deference to an association's view of what would impair its expression, the Court recognized that the activist's "presence in the Boy Scouts would . . . force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior," 530 U.S. at 653, "a point of view contrary to its beliefs." *Id.* at 654.

"'Since *all* speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U.S. at 573 (emphasis in original; internal citation omitted) (quoting *Pacific Gas*, 475 U.S. at 11, 16). I-872 compels the Republican Party to associate publicly with any candidate who "prefers" the Republican label. It thereby forces the Party to either alter its speech to distinguish

between "true" and "sham" Republican candidates or remain silent at the risk of losing control over its message. Because the Republican Party is "conjoined with" all "Republican" candidates, *see* I-872, § 4, JA 412, including those who do not share its core values, its autonomy to choose the content of its message is compromised. *See Hurley*, 515 U.S. at 576. I-872 impairs the efficacy of even the simplest messages to the Republican Party's core constituency, such as "Vote Republican," if the State lists two candidates on the general election ballot as "Republican." Furthermore, Washington law requires that all political advertising regarding partisan office identify the party of the candidate. WASH. REV. CODE § 42.17.510(1) (2006).[6] Republican Party speech disavowing a candidate who claimed a "preference" for the Republican Party would still have to identify that candidate as a "Republican."

The Court explained its compelled speech cases in *Rumsfeld v. Forum for Academic & Inst'l Rights*, 547 U.S. 47, 126 S. Ct. 1297 (2006). The "compelled-speech violation[s]" in *Hurley* and *Pacific Gas* "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld*, 126 S. Ct. at 1309. The Court explained that in *Dale*, the Boy Scouts' First Amendment right of expressive association was violated by the forced inclusion of a leader whose "message" ran counter to that of the association. *See id.* at 1312. Similarly, forcing unwanted messages and messengers on the Republican Party by inclusion of sham or

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[6] The statute in effect at the time this lawsuit was filed provided, in relevant part: "The party with which a candidate files shall be clearly identified in political advertising for partisan office." WASH. REV. CODE § 42.17.510(1) (2004). The current statute became effective January 1, 2006. *See* S.B. 5034, 59th Leg., Reg. Sess. (Wash. 2005).

rejected Republican candidates impairs the Party's ability to define and promote its message.

None of this Court's prior decisions even hint that a candidate may invoke the First Amendment to hijack a party's name. Courts facing attempted hijackings by candidates have resoundingly affirmed a political party's right to determine who may – and who may not – associate with it. This Court recognizes that both states and parties may act to require pledges of support for a party from candidates seeking to affiliate with a party in a primary. "A state's *or a political party's exclusion of candidates from a party primary* because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy and leadership of that party." *Ray v. Blair*, 343 U.S. 214, 227 (1952) (emphasis added).

In *Duke v. Massey*, 87 F.3d 1226, *reh'g en banc denied*, 98 F.3d 1355 (11th Cir. 1996), David Duke expressly claimed a First Amendment right to associate with the Republican Party. The court upheld the Party's right to reject Duke as a candidate because Duke did not have "the right to associate with an 'unwilling partner'" and his "interests [did] not trump the Republican Party's right to identify its membership based on political beliefs." *Id.* at 1232-34. *See also Duke v. Cleland*, 954 F.2d 1526, 1531 (11th Cir.), *cert. denied*, 502 U.S. 1086 (1992) ("Duke has no right to associate with the Republican Party if the Republican Party has identified Duke as ideologically outside the party.").

In *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), the court described the severe burden that a forced association with candidates places upon a political party:

> [T]he Party's interest is not merely legitimate. Here, the associational rights of the Democratic National Party are at their zenith. The Party's ability to define who is a "bona fide Democrat" is nothing less than the Party's ability to define itself. . . .
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> * * *
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> . . . . By narrowing the field of those who represent it, the Party seeks to define its values, distinguish them from those of its competitors, and thereby attract like-minded voters. At the same time, it seeks to prevent confusion among those voters by excluding from its list of potential presidential nominees those who do not share those values. . . .
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> * * *
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> [The Party is not] required to accept LaRouche's selfdesignation [sic] as the final word on the matter. Rather, the Party's "freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.'"

Id. at 995-97 (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986)). The underlying principle is mutuality of association.

LaRouche and the *Duke* cases are consistent with this Court's approach in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) and *Clingman v. Beaver*, 544 U.S. 581 (2005). *Timmons* upheld Minnesota's law prohibiting an individual from appearing on the ballot as the candidate of more than one party. The Court noted that the New Party was free to try to persuade the candidate in question to run under its banner rather than associate on the ballot with another party. 520 U.S. at 360. However,

the New Party could not use the First Amendment to force an unreciprocated association with a candidate on official state ballots, where the candidate chose to be the nominee of a different party.[7] In *Clingman*, the Court ruled that voters who affirmatively affiliated with rival parties did not have a First Amendment right to vote in Libertarian primaries, unless they made their association mutual or at least were willing to forego their association with a rival party by declaring themselves independents. 540 U.S. at 592. *LaRouche* and the *Duke* cases simply apply the same principle to situations where a political party has chosen to associate with another candidate.

Washington has also recognized that candidates do not have an unlimited right to use any party name they please on the State's official ballots. *See State ex rel. LaFollette v. Hinkle*, 229 P. 317 (Wash. 1924) (enjoining State from printing names of candidates under "LaFollette State Party" name without the consent of LaFollette). The court of appeals adhered to these principles when it concluded that I-872's forced "association by the candidates against the will of the parties and their membership constitutes a severe burden on political parties' associational rights." Pet. App. 25a. A candidate who "prefers" the Republican Party is free to seek the

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[7] *Timmons* also rejected the argument now advanced by the Grange that non-Republican candidates have a "free speech" right to require the listing their party preference on the ballot. *See* Grange Br. at 19. Rejecting the New Party's claim of a right to use the ballot to express its general support for a candidate who was not its nominee, the Court stated that "[b]allots serve primarily to elect candidates, not as fora for political expression." 520 U.S. at 363. Under *Hurley*, the Republican Party *does* have a First Amendment right to keep the State of Washington from forcibly including outsiders marching under the Republican banner in the primary.

Republican nomination, but cannot appropriate the name if the Party selects another standard bearer.

This Court has acknowledged that "to the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian*, 479 U.S. at 220. In *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), the Sixth Circuit struck down Ohio's election statute that prohibited non-party candidates from using the designation "Independent" next to their names on the ballot. The court relied in part on the value of party labels. *See id.* at 172-73. For example:

> [P]arty candidates are afforded a "voting cue" on the ballot in the form of a party label which research indicates is the most important determinant of voting behavior. Many voters do not know who the candidates are or who they will vote for until they enter the voting booth.

Id. at 172.

From statehood, party labels in Washington have implied "[a]dherence to certain principles and policies" and thus provided meaningful guidance to voters. SHELDON, *supra* at 67. The Grange admits the candidate's party preference creates a link between the candidate's message and that of the Republican Party. *See* Grange Br. at 21-22. The 1991 Louisiana gubernatorial election involving arch-segregationist David Duke, made infamous by the opposition's bumper sticker, "VOTE FOR THE CROOK: IT'S IMPORTANT," illustrates the association in the public's mind between candidates and the party whose name they

carry, whether the candidate is the party nominee or simply "prefers" that party.[8] *See* Michael Riley, *Louisiana: The No-Win Election,* TIME, Nov. 25, 1991, *available at* http://www.time.com/time/printout/0,8816,974345,00.html (last visited July 11, 2007). In this case, the State attempts to adulterate the "voting cue" provided to voters by allowing any candidate to appropriate the label "Republican," whether that candidate supports or opposes the political philosophy of the Republican Party and its adherents.[9]

The Republican Party name has meaning and electoral value:

> . . . Parties are known by names . . . which distinguish and differentiate the various parties in the public mind. The name "Democratic" is an important distinguishing mark of the party which carries that appellation, as "Republican" . . . [is] of [an]other similar large organized group[] of voters. Through custom and usage certain rights attach to the use of a party name and emblem.

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[8] Under Louisiana's form of a "top two" primary, when former Governor Edwards filed as a Democrat and a Republican congressman, the Republican governor, and arch-segregationist David Duke filed as Republicans, the crossover vote allowed Duke to edge out the two candidates supported by the Republican Party.

[9] The State's emergency regulations provide further evidence of the association established between candidate and party by party identification on the ballot. WASH. ADMIN. CODE § 434-230-040 (2005) prohibits a candidate from changing his "party preference" between the primary and general elections. JA 601. If the purpose of listing "party preference" is merely for the candidate to provide information to voters, voters should be made aware of any change in the candidate's preference, especially if the change occurs between the primary and general elections.

> It is a matter of common knowledge that in campaigns at general elections such terms as "Democrat," "Democrats" and "Democratic" have been used for such a length of time as to render their beginnings almost in "time out of memory" to connote the Democratic Party, its members and candidates. The same observation is equally true of "Republican," "Republicans" and "Republican Party."

Plonski v. Flynn, 222 N.Y.S.2d 542, 544-45 (1961) (quoting *Chambers v. Greenman Ass'n*, 58 N.Y.S.2d 637, 641 (1945)).

Washington recognizes "the right to the exclusive use of an established name" for non-commercial associations. *Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Universal Grand Lodge*, 381 P.2d 130, 140 (Wash. 1963). "The underlying concept is that of unfair competition in matters in which the public generally may be deceived or misled." *Id.* at 135. Under *Grand Lodge*, the unauthorized use of a name that is identical to or indistinguishable from an established name causes confusion and diverts support from the legitimate organization. *Id.* at 136. Recognizing the value of party labels, I-872 acknowledges that candidates will be "trading" on the reputation and name of the Republican Party. It expressly states that party labels are "for the information of voters." I-872, § 7(3), JA 414. The "information" is no more and no less than an association of the candidate with the Republican Party's philosophy and positions.[10]

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[10] It is no defense that voters might be able to discern from other sources which candidates carrying the Republican Party name on state ballots are the Party's candidates and which have merely appropriated its name. Petitioners do not dispute the lower courts' conclusions

(Continued on following page)

The self-designation of candidates under I-872 coupled with the "top two" requirement also severely burdens the Republican party by creating an unreasonably high threshold for general election ballot access. In order to assure advancement to the general election under a "top two" primary, the Republican Party nominee must obtain more than one-third of the total primary vote. The actual required percentage for general election ballot access for any given primary for any given office will be a moving target.[11] The presence of multiple candidates, each listed as "Republican," poses a risk of voter confusion and dilutes support for the Party's nominee. The ability of candidates to unilaterally associate themselves with the Republican Party interferes with the Party's ability to marshal support for its nominee and finish in the top two.

The risk of vote-fracturing is real. In the only convention conducted before I-872 was declared unconstitutional, the unsuccessful candidate for the Republican nomination declared his intention to file as a Republican anyway.

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regarding the importance of candidates' ballot designations in electoral behavior. *See* State Br. at 48-49, Grange Br. at 19, 21-22 & n.4. This Court recently declined to make a sweeping assumption that voters possess great sophistication, noting that during the 2000 elections, 85% of surveyed voters could not name even a single candidate for the U.S. House of Representatives in their district. *See FEC v. Wisc. Right to Life, Inc.*, 168 L. Ed. 2d 329, 347 n.6 (2007). In contrast, party identification on the ballot has great impact on voter behavior: "Voting studies conducted since 1940 indicated that party identification is the single most important influence on political opinions and voting. . . . [T]he tendency to vote according to party loyalty increases as the voter moves down the ballot to lesser known candidates seeking lesser known offices at the state and local level." *Rosen*, 970 F.2d at 172.

[11] For example, in a primary with six candidates, who divide the vote approximately equally, general election ballot access could be obtained with approximately 17% of the total primary vote.

JA 362-63. In 1980, there was a large Republican field in the gubernatorial primary. The eventual governor, John Spellman, would not have appeared on the general election ballot had I-872 been in effect. Instead, two Democrats would have appeared on the general election ballot. JA 408-09.

The 1996 gubernatorial primary in which the Republican vote was widely fractured provides a more recent example of the potential consequences of I-872. JA 368. Although eight Republican candidates garnered nearly 48% of the total primary vote, the Republican nominee in the primary obtained only 15.26% of the vote, behind the top two Democratic candidates. JA 665. Under I-872, the Republican Party would have had no candidate in the general election. Likewise, the Republican Party would not have had a candidate for lieutenant governor on the 1996 general election ballot. The top Republican vote-getter received 19.43% of the primary vote, less than the top two Democratic candidates. *Id.* These percentages show substantial strength well above the "modicum" of support which states may require to obtain general election ballot access. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986). Should seven Republican candidates equally divide seventy percent of the primary vote and two Democrats evenly divide thirty percent, I-872 would place the two Democrats on the general election ballot.

Laws that create unreasonable obstacles to ballot access violate associational rights under the First Amendment. "Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively, and may not survive scrutiny under the First and Fourteenth Amendments."

Munro, 479 U.S. at 193 (approving Washington's former one percent ballot access requirement for party nominees) (internal citation omitted). Neither this Court nor any other federal court has approved a state law that requires a political party to obtain more than one-third of the vote to achieve access to the general election ballot.

The State's reliance on *Williams v. Rhodes*, 393 U.S. 23 (1968) and *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) as justification for the modified blanket primary is misplaced both in principle and practice. Those cases involve access to the general election ballot and state electoral systems that unreasonably limited general election ballot access. To the extent that *Williams* applies to I-872, it provides another ground to invalidate the primary. To be assured of a position on the general election ballot, a single candidate of *any* political party must garner more than one-third of the total votes cast at the primary. This Court struck down the ballot access threshold of 15% in *Williams* as unreasonable, where a party could rally behind a single candidate for each office. A general election ballot threshold of higher than 5% has never been approved. *See Jenness v. Fortson*, 403 U.S. 431 (1971). Had I-872 been in place from 1992 to 2002, the general election ballots in Washington would have had only one minor party candidate where two or more major party candidates filed for a position. JA 752.

c. The modified blanket primary forces the Republican Party to associate with rival party voters.

The First Amendment prohibits Washington from forcing a political party to associate with rival-party and unaffiliated voters in nominating its candidates. *See*

Jones, 530 U.S. at 574 ("Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.") (internal quotation marks and citation omitted). "In no area is the political association's right to exclude more important than in the process of selecting its nominee." *Id.* at 575.

Section 3(3) of I-872 declares it a "fundamental right" to choose which candidate will carry the Republican standard in the general election, regardless of the "party preference or affiliation of either the voter or the candidates.[12] JA 411. The Explanatory Statement in the official Voters' Pamphlet confirms that I-872 results in rival-party and unaffiliated voters selecting the Republican standard bearer: "Voters would be permitted to vote for any candidate for any office, and would not be limited to a single party." JA 405. As with the blanket primaries invalidated in *Jones* and *Reed*, the participation of these voters is intended to change the Republican candidate in the general election. The initiative sponsor's website stated that the modified blanket primary "should force the political parties to compete more effectively for these offices. . . . Under this initiative, parties should seek candidates with broad public support who can survive a competitive primary." JA 73. The sponsor explained that "[q]ualifying primaries are more likely to produce public officials who represent the political preferences and opinions of a broad cross-section of the voters. Candidates

[12] California's blanket primary also guaranteed the "right" to choose which candidates would carry their party standard in the general election "regardless of . . . political affiliation." CAL. ELEC. CODE § 2001 (1999), cited in *Jones*, 530 U.S. at 570.

will need to appeal to all the voters, partisan and independent alike. They will not be able to win the primary by appealing only to party activists." JA 78-79.[13] These points are echoed in the official Voters' Pamphlet. JA 406 ("Parties will have to recruit candidates with broad public support. . . . "). In *Jones*, this Court described this objective as "nothing more than a stark repudiation of freedom of political association." 530 U.S. at 582.

I-872's goal of adulterating the Republican message by making its candidates more like the general electorate, and less like Republican voters, is prohibited:

> In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process . . . by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome – indeed, in this case the *intended* outcome – of changing the parties' message. We can think of no heavier burden on a political party's associational freedom.

Jones, 530 U.S. at 581-82 (emphasis in original); *see also id.* at 587 (Kennedy, J., concurring) ("The true purpose [of California's blanket primary] is to force a political party to accept a candidate it may not want, and, by so doing, to change the party's doctrinal position on major issues."). The State may not substitute its judgment for that of the Republican Party regarding the message it advances. *See Hurley*, 515 U.S. at 579 ("[T]he law . . . is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the

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[13] The initiative also unconstitutionally seeks to redirect the focus of minor political parties from high-profile statewide and federal offices to lower-level elected offices. JA 80.

government."); *Jones*, 530 U.S. at 587 (Kennedy, J., concurring) ("[Although a] political party might be better served by allowing blanket primaries as a means of nominating candidates with broader appeal . . . , this is an issue for the party to resolve, not for the State."); *Pacific Gas*, 475 U.S. at 20 ("Our cases establish that the State cannot advance some points of view by burdening the expression of others.").

The State analogizes I-872 to Washington's ballot access statute at issue in *Munro*. State Br. at 22, 38. In *Munro*, the Socialist Worker Party objected to the statutory requirement that its nominee, who was its sole candidate, receive one percent of the total vote cast in the primary in order to advance to the general election. Washington's applicable law expressly vested in the Socialist Workers Party exclusive authority to choose its nominee. *See* 479 U.S. at 191. Washington law also gave each minor party the right to prevent unauthorized use of its party name on the ballot. *See, e.g.*, WASH. REV. CODE § 29.24.045(2) (2002). Unlike I-872, primary voters were not presented with all candidates who wanted to run under the Socialist Workers Party standard, but rather only the single candidate nominated by the party. The intraparty competition had already been resolved.[14]

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[14] With respect to minor party candidates, Washington's old blanket primary might have operated as a type of "nonpartisan blanket primary." The minor parties nominated candidates by conventions of their adherents, and then had to show a modicum of support at the primary to advance to the general election. For them, Washington had "separat[ed] the nominating process from the winnowing process," State Br. at 38, but I-872 continues the primary's use to resolve intraparty competition.

2. Even if I-872 did not select the Republican Party's standard bearers for the general election, it severely burdens core First Amendment rights by reducing the right to nominate to a right to endorse.

Petitioners contend that under I-872, "voters do not choose a party's nominee," State Br. at 41, and "primary voters are not choosing any political party's nominee." Grange Br. at 31 (emphasis in original).[15] If this were true, I-872 still places a severe burden on the Party's "basic function" of choosing its own leaders.

A political party has the right to nominate under its own rules absent a valid state requirement of a primary to resolve the intraparty contest. *See, e.g., American Party v. White*, 415 U.S. 767, 781 (1974); *Ray*, 343 U.S. at 220-21. At statehood, Washington recognized this inherent power, *see* 1889-90 WASH. LAWS, ch. XIII, p. 419, §§ 2-3, and general election ballots reflected a candidate's party designation from the certificate of nomination filed by the political parties. *See id.*, p. 406, § 17. Washington did not

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[15] The Grange points repeatedly to emergency regulations (WASH. ADMIN. CODE § 434-262-012 (2005)) adopted by Washington's Secretary of State for the proposition that I-872 does not "serve" to nominate the Republican Party's candidates. The regulations, to the extent that they are even relevant to interpreting I-872, should be disregarded. The State rushed to adopt those regulations in anticipation of a challenge to I-872. "There are two reasons why the [Declaration of Candidacy] form needs to be finalized in such an expeditious manner. One, the form needs to be adopted by emergency WAC prior to the political party's lawsuits, which are expected to be filed first thing next week. . . ." Appendix to Republican Party Brief 4a. This Court has rightly rejected litigation positions masquerading as legitimate exercises of regulatory authority. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

abolish the right to nominate when adopting its direct primary law in 1907. It merely required the Republican Party to determine its nominee through a public process.[16] From 1907 onward, the "nominee" of the Republican party chosen at the primary appeared on the general election ballot. *See, e.g.*, WASH. REV. CODE § 29.30.095 (2002).

The State maintains that I-872 "returns the relationship between the political parties and the state to what existed before the state required a party primary nominating process, and returns to the parties the ability to select their nominees however they choose." State Br. at 37. Both the State's pre-litigation interpretation of the statute and Washington's nomination process prior to 1907 contradict this claim. Following passage of I-872, the Republican Party notified state election officials that it would nominate Republican candidates by convention. JA 82-87. The election officials uniformly responded that there is no "language associated with the Initiative that contemplates a partisan nomination process separate from the primary." JA 104-11. Prior to the adoption of the direct primary in 1907, and in contrast to I-872, election officials ensured that political parties' nominees were properly certified to represent the parties. *See* 1889-90 WASH. LAWS, ch. XIII, pp. 400-04, §§ 3-10. I-872 even purports to strip Washington's political parties of the power to "perform all functions inherent in such an organization." I-872, § 14, JA 418.

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[16] The 1907 primary election law acknowledged nomination of candidates as one of the "functions inherent to [political parties], the same as though this act had not been passed: *Provided*, that in no instance shall any convention have the power to nominate any candidate to be voted for at any primary election." 1907 WASH. LAWS, ch. 209, § 22.

A state's ability to regulate the time, place and manner by which parties select their standard bearers is limited by the First Amendment right to associate. *See Eu*, 489 U.S. at 222. With no other effective mechanism for nominating candidates under I-872, intraparty competition among candidates who identify with the Republican Party is resolved at the primary. In essence, the modified blanket primary, like the primary invalidated in *Jones*, "has simply moved the general election one step earlier in the process, at the expense of the parties' ability to perform the 'basic function' of choosing their own leaders." *Jones*, 530 U.S. at 580 (internal citation omitted). Any "nomination" by the Republican Party under I-872 is functionally identical to a mere endorsement. The expression of a "preference" by the Republican Party among the identified Republicans on the primary ballot has the same effect as an expression of "preference" among the Republicans on the primary ballot by the Washington Grange.

> The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee. In *Eu*, we recognized that party-leadership endorsements are not always effective – for instance, in New York's 1982 gubernatorial primary, Edward Koch, the Democratic Party leadership's choice, lost out to Mario Cuomo.

Jones, 530 U.S. at 580.[17]

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[17] The Court specifically noted that a party's recommendations, even to its members in a closed primary, can be of limited value. *See Jones*, 530 U.S. at 580-81. I-872 does not restrict balloting for Republican identified candidates to Republicans, further reducing the utility of party "endorsement."

3. The State has no interest in forcibly associating the Republican Party with any candidate who seeks to use the Republican Party's name to advance a quest for public office and with non-affiliated or rival party voters.

Neither petitioner argues that I-872 serves a compelling state interest and is narrowly tailored to serve that interest. Nor did they advance that claim before the Court of Appeals. Pet. App. 30a. As a result, if I-872 severely burdens the Republican Party's First Amendment rights, no further discussion is needed. Even under a relaxed standard of testing constitutionality for state-imposed burdens that are not severe, however, I-872 fails.

a. The State's asserted interests in providing easy ballot access for candidates and in informing voters do not justify burdening the Republican Party's with messages and messengers the Party does not want.

It is up to an expressive association, not the State, to determine which messages or participants in the association would impair its message. *See Dale*, 530 U.S. at 653 ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."); *Hurley*, 515 U.S. at 575 ("[I]t boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."); *Democratic Party v. Wisc. ex rel. La Follette*, 450 U.S. 107, 123-24 (1981) ("[A] State . . . may not constitutionally substitute its own judgment for that of the Party."). I-872 forces the Republican Party to include messages and speakers in its "parade" that may

be contrary to the message the Party wants to send. Contrary to the Grange's contention, Grange Br. at 36, the parade in question is not the "modified blanket primary," but rather the Republican Party itself, and I-872 forces association of the Republican Party and its message with candidates not of its choosing.

The State's claimed interest in providing "easy access to the ballot," State Br. at 30, could be accomplished without forcing the Republican Party to be associated with unwanted candidates. The State could guarantee access for independent and minor party candidacies,[18] which satisfies the First Amendment interests of both the candidate and voter. *See Duke v. Massey*, 87 F.3d at 1234 (" . . . Duke supporters do not have a First Amendment right to associate with him as a Republican Party presidential candidate. Duke's supporters were not foreclosed from supporting him as an independent candidate, or as a third party candidate in the general election.").

A state has no valid interest in placing information on the ballot for the purpose of influencing how voters use the franchise. Thus, Missouri's effort to influence voters by communicating whether a candidate supported or opposed term limits was prohibited. *See Cook v. Gralike*, 531 U.S. 510 (2001). Similarly, Louisiana's inclusion of a candidate's race on the ballot was also prohibited as an improper effort to promote race-based voting. *See Anderson v. Martin*, 375 U.S. 399 (1964). Printing a candidate's self-selected party preference,

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[18] Washington's present primary laws (also in effect immediately before adoption of I-872) provide guaranteed access to the general election ballot for both third party and independent candidates. *See* WASH. REV. CODE § 29A.20.121(1), (4) (2006).

where that preference is not reciprocated, is to provide that candidate with the electoral advantage that comes from association with a major political party.[19]

Petitioners do not dispute that the State will list on the ballot, with the Republican label, candidates for whom the Republican Party has no preference, the same as the State's listing of candidates who have been selected by the Party. Washington's Supreme Court has recognized that a nonprofit association has a protectable interest in its name and may prevent unauthorized use: "an established fraternal organization is entitled to relief when its name or one so similar as to be deceiving is adopted by another organization and used in a manner which is confusing and deceiving to the public and is detrimental to the organization already using the name." *Grand Lodge*, 381 P.2d at 135. The district court correctly concluded "that allowing any candidate, including those who may oppose party principles and goals, to appear on the ballot with a party designation will foster confusion and dilute the party's ability to rally support behind its candidates." Pet. App. 79a.

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[19] Washington's asserted interest in providing "information" to voters by listing candidates' "party preference" on the ballot could only possibly be satisfied if the "party preference" correctly reflects whether the candidate actually accepts the principles espoused by his preferred party. I-872's "party preference" provision, however, provides no more reliable information about a candidate's policies or positions than expressing a preference for the color "blue" on the ballot.

b. The State calls into question the primary systems of forty-nine other states by asserting that a constitutionally effective vote requires the ability to participate in selecting the standard bearers of multiple parties.

The State asserts that the right to cast an "effective vote" includes not being "limited to voting for the candidates of a single political party" at the primary. State Br. at 30. The claim contradicts this Court's conclusion that the right to cast an effective vote does not include selecting the standard bearer of a party to which the voter does not belong. *See Jones*, 530 U.S. at 583. It also calls into question the primary system of the forty-nine states that preclude a voter from casting an "effective vote" by limiting the voter to participation in a single primary.[20] "If the 'fundamental right' to cast a meaningful vote were really at issue in this context, [the blanket primary] would be not only constitutionally permissible but constitutionally required, which no one believes." *Id.* at 573 n.5. Under the State's formulation, not even the Republican Party's determination of its membership and association could prevail over the voter's right to cast an "effective vote."[21]

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[20] The District Court for the Northern District of Mississippi recently classified the primary election systems of all fifty states. *See Miss. State Democratic Party v. Barbour*, No. 4:06CV29-P-B, 2007 U.S. Dist. LEXIS 41908 at *24-*33 (E.D. Miss. June 8, 2007). Every state other than Washington (and Louisiana for state elections) limits voters to a single party's ballot for the primary election.

[21] The State also attempts to justify I-872 because it may advance some voters' "wish to associate with a minor party that has difficulty obtaining access to the primary ballot." State Br. at 29. In essence, the State asserts that by erecting obstacles to minor party ballot access, it can bootstrap its way to validating I-872's intrusion on the Republican Party's right to select its nominee. The State is wrong.

There would be no limiting construction on the State's conception of the right to cast an "effective vote."

The State's rule also has profound implications for the right of association outside the political primary context. It challenges any organization's right to determine the scope of its expressive association and shifts the right to define the make-up of the organization from the group to any individual who wishes to participate. *Contra Dale*. Under its rule, the State could decide that individuals could force parade organizers to include messages contrary to the message of the organizer's choice. *Contra Hurley*; *contra Pacific Gas*. At its base, the "right" to cast an "effective vote" by participating in selecting the messenger and message of a party to which a voter does not belong repudiates much of existing First Amendment jurisprudence, including both *Jones* and *Clingman*.[22]

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[22] *Amicus* State of Louisiana asserts that this Court's decision regarding Washington's primary should have no effect on the Louisiana system. The Court need not attempt to issue an advisory opinion on Louisiana law. First, Louisiana uses a "closed primary" to nominate candidates for Congress. *Amicus* Br. at 7. For state offices, Louisiana does not have a true primary election at all. Its "primary" is, by operation of law, a general election. The primary's status as a general election is what prompted this Court to hold that the Louisiana system violated federal law requiring a uniform election day for congressional offices. *Foster v. Love*, 522 U.S. 67, 72 (1997). Second, there is nothing in the record to indicate whether Louisiana's political parties have objected to, or have rules inconsistent with, its primary system. In the absence of any developed record or indication that Louisiana's system is in any way inconsistent with political party rules, or objectionable to Louisiana's political parties, the Court should not attempt to resolve the constitutionality of the Louisiana system. Third, under Louisiana law, the parties may collect an additional filing fee from candidates who seek to run under the respective party banners. LA. REV. STAT. ANN. § 18:464(C) (2007). To the extent that the parties accept fees from candidates, they may be said to have ratified an association with the candidate. Louisiana also permits candidates to appear on the ballot

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4. The State may not evade constitutional protections on core First Amendment rights by cosmetic changes to nomenclature, mere labels, and sham declarations of permitted legislative purpose.

I-872 makes cosmetic changes to Washington law in order to continue the same state conduct previously held to violate the First Amendment right of the Republican Party to select its standard bearers, its "ambassadors to the general electorate." Fundamental constitutional rights are not subject to legislative evasion, whether by serial evasion of rights under the Fourteenth and Fifteenth Amendments in the "White primary" cases, term limits for members of Congress, or sham declarations of secular purpose to avoid the Establishment Clause. If a state statute deprives persons of rights under the federal Constitution, it is invalid whether the deprivation is direct or indirect, "sophisticated [or] simple-minded." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995).

From 1927 to 1953, this Court repeatedly addressed Texas' efforts to defeat equal protection and the right to vote under the Fourteenth and Fifteenth Amendments. In *Nixon v. Herndon*, 273 U.S. 536 (1927), the Court struck down a Texas statute that explicitly barred African-Americans from voting in the Democratic primary. Texas promptly adopted a different primary law, transferring authority to determine voting qualifications to the

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under a party name based on signatures of voters, regardless of party affiliation and without allowing parties to collect an additional fee. *Id.* §§ 18:461(A)(1) & 18:465(D). Under *Jones*, that method of qualifying to appear on the ballot under a recognized party name may not survive constitutional scrutiny if contrary to the rules of a political party.

Democratic Party, which also barred African-Americans. Justice Cardozo noted that "[t]he result for [Nixon] is no different from what it was when his cause was here before. The argument for the respondents is, however, that identity of result has been attained through essential diversity of method." *Nixon v. Condon*, 286 U.S. 73, 83 (1932) (Cardozo, J., concurring). The Court declared the revised Texas primary statute unconstitutional. Texas then freed the Democratic Party from state oversight, leading again to the exclusion of African-American voters from the primary election and this Court's subsequent decision in *Smith v. Allwright*, 321 U.S. 649 (1944). In *Terry v. Adams*, 345 U.S. 461 (1953), the Court faced and invalidated yet another effort to evade compliance with the Constitution, in the form of the Jaybird Democratic Association. Concurring that the "Jaybird primary" violated the Constitution, Justice Clark noted that "[a]n old pattern in a new guise is revealed by the record." 345 U.S. at 480 (Clark, J., concurring).

The modified blanket primary is also an old pattern in a new guise. I-872 "will give voters the freedom they enjoyed under the blanket primary – to vote for any candidate they prefer for each office." JA 77. I-872 expressly declares a "right" to "cast a vote for any candidate . . . without any limitation based on party preference or affiliation, of either the voter or the candidate." I-872, § 3(3), JA 411.[23] This declaration directly contravenes a long line of First Amendment precedent summarized in *Jones*: "[A] nonmember's desire to participate in the

[23] Washington's former blanket primary granted the same "right" to vote for "any candidate for each office, regardless of political affiliation." WASH. REV. CODE § 29.18.200 (2002).

party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." 530 U.S. at 584 (internal quotation marks omitted).

In *U.S. Term Limits*, the Court noted that the name "U.S. Term Limits, Inc." implied the forbidden purpose of the state constitutional amendment: "[a] practical limit on the terms of the members of the Congress." 514 U.S. at 829 n.42. Here, the sponsor's website to promote I-872, "www.blanketprimary.org," JA 66, and its battle-cry, "I-872 – Preserve the blanket primary," JA 65, reveal what I-872 is: the old blanket primary repackaged.

The modified blanket primary also sought to achieve an identity of result through diversity of method. Petitioners assert that by substituting "preference" for "designation" in the filing statute, I-872 avoids the parties' First Amendment rights. *See* I-872, § 9(3), JA 415. However, the government "cannot foreclose the exercise of [First Amendment] rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). I-872 still compels the Republican Party to be associated with candidates against its will, and to have unaffiliated and rival party voters select its "ambassador to the general electorate." *Jones*, 530 U.S. at 575.

Repeated assertions that voters are not selecting the party's nominee cannot alter the statute's purpose or effect. The purpose of a statute is determined "by drawing logical conclusions from its text, structure, and operation." *Nguyen v. INS*, 533 U.S. 53, 68 (2001). When evaluating the legislative purpose in a constitutional challenge, this Court can and does reach beyond the face of a statute. "While the Court is normally deferential to a State's articulation of . . . purpose, it is required that the

statement of such purpose be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) (declaration of secular purpose in requiring teaching of "creation science"). A court may find improper purpose behind a statute by examining the statute on its face, its legislative history, the historical context of the statute and the specific sequence of events leading to passage of the statute. *Id.* at 594-95. With I-872, the prohibited purpose is manifest in the statute itself, its context, and the sequence of events leading to its passage.[24]

The old blanket primary was declared unconstitutional. *See* I-872, § 2, JA 411. Washington's legislature passed a bill similar to I-872 that the governor vetoed, expressing both practical and constitutional concerns with that version of the modified blanket primary. JA 573-579. The replacement primary system adopted by Washington "gave the state party bosses more control over who appears on the general election ballot." Official Voters' Pamphlet "Statement For" I-872, JA 407. Petitioner Grange "opposes primaries in which voters are restricted to voting for candidates of only one party and does not want to see political parties gain control of the primary." JA 77. The Grange launched the I-872 campaign because "[w]e know that the voters of Washington overwhelmingly

[24] Even I-872's asserted purpose to increase voter choice and help third parties is suspect. The Court need give no deference to I-872's declaration of preserving voter choice where "the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975). The effective elimination from the general election of third parties altogether and even one of the major parties in areas where it may be weak does not protect "voter choice," which is a function of diverse voices at the general election. *See Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957).

support the blanket primary. . . . Through this initiative, we can continue to have all the benefits of the blanket primary system, including the right of a voter to pick any candidate for any office." JA 69-70. Under I-872, "[c]andidates for partisan offices would *continue* to identify a political party preference when they file for office, and that designation would appear on both the primary and general election ballots." JA 68 (emphasis added). State election officials were "not aware of any language associated with the Initiative that contemplates a partisan nomination process separate from the primary." JA 105, 107, 109, 111. Set against I-872's operative provisions and their explanation by the sponsor, conclusory assertions that primary voters are not determining the parties' nominees are contrary to fact and common sense.

5. The lower courts violated neither separation of powers nor principles of federalism when striking down an initiative that violated the First Amendment.

The Grange's assertion that principles of federalism justify I-872's invasion of core rights of political association because states should be free to be "laboratories" ignores the numerous decisions of this Court invalidating state experiments that tread upon the First Amendment, including the invalidation of California's experiment with the blanket primary. *See Jones*; *Hurley* (invalidating application of state anti-discrimination statute that impaired expressive association); *Dale* (same); *Cook* (state "experiment" providing voters with "information" intended to affect exercise of franchise). Declaring I-872 invalid was fully in accord with principles of federalism and the supremacy of the federal Constitution. *See* U.S. CONST.

art. VI, cl. 2. Principles of federalism did not justify Connecticut's invasion of core rights of political association in *Tashjian* because the state's ability to regulate elections "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." 408 U.S. at 217.

Similarly, neither lower court violated the separation of powers by declaring I-872 invalid. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"). The Grange's reliance on *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006) is misplaced. This Court noted: "Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue and how easily we can articulate the remedy." *Id.* at 329. The Court has very clearly articulated the "background constitutional rules at issue":

- "The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights." *Tashjian*, 479 U.S. at 217.
- "The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee." *Jones*, 530 U.S. at 580.
- Political parties have the right to "identify the people who constitute the association, and to limit the association to those people only." *La Follette*, 450 U.S. at 122.
- "[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication

advanced, the speaker's right to autonomy over the message is compromised." *Hurley*, 551 U.S. at 576.

- Candidates carrying the party standard are "the party's ambassador to the general electorate in winning it over to the party's views." *Jones*, 530 U.S. at 575.
- There is "no heavier burden on a political party's associational freedom" than forcing it to associate with nonmembers and rivals at the point of selecting its standard bearer. *Jones*, 530 U.S. at 582.

The remedy is also easily articulated. The district court enjoined the State from implementing the initiative, and the court of appeals affirmed the permanent injunction.

I-872 by its terms, intent, and operation impaired the Republican Party's First Amendment rights, and both lower courts acted squarely within the powers of the judicial branch in declaring it unconstitutional.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted.

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APPENDIX

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff Intervenors,

vs.

DEAN LOGAN, King County Records & Elections Division Manager, et al.,

Defendants,

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE, et al.,

Defendant Intervenors.

NO. CV05-0927-TSZ

DECLARATION OF KEVIN B. HANSEN

NOTE ON MOTION CALENDAR: WEDNESDAY, JULY 13, 2005

WITH ORAL ARGUMENT

KEVIN B. HANSEN declares under penalty of perjury under the laws of the State of Washington and the United States of America as follows:

1. I am one of the attorneys for the plaintiffs in this lawsuit, am competent to testify, and make this declaration of my own personal knowledge.

. . . .

4. Attached hereto as Exhibit 3 are true and correct copies of the following pages of the documents received from the Secretary: 7, 11, 30, 41, 158-59, 228-29, 231, 302-03, 381-82, 453, 467-69, 583, and 728.

SIGNED this 23rd day of June, 2005 in Kirkland, Washington.

/s/ Kevin B. Hansen
KEVIN B. HANSEN

EXHIBIT 3
to
Declaration of
Kevin B. Hansen

From: Cervantes, Amber

Sent: Friday, May 13, 2005 4:54 PM

To: [Recipients' names omitted]

Cc: Elections – All

Subject: Declaration of Candidacy

Dear Election Administrators,

Attached is the Declaration of Candidacy Form including instructions. They have been revised to reflect the suggestions made at conference. We are going to have the forms reprinted. The office of the PDC plans to have them out in the mail to you by the end of May/beginning of June.

Please review the form and instructions and provide any suggestions for change to me by 3:00 pm on Monday, May 16.

There are two reasons that the form needs to be finalized in such an expeditious manner. One, the form needs to be adopted by emergency WAC prior to the political party's [sic] lawsuits, which are expected to be filed first thing next week. And two, the form needs to get to the printer so that the PDC has plenty of time to get the forms out to the counties.

Thank you and have a great weekend.

Amber Cervantes
Office of the Secretary of State
Certification and Training Program
360.902.4165
acervantes@secstate.wa.gov

[Additional Pages Omitted]

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SUPREME COURT, U.S.

(16)

NO. 06-730

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON; ROB MCKENNA, ATTORNEY GENERAL; SAM REED, SECRETARY OF STATE,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; MICHAEL YOUNG; DIANE TEBELIUS; MIKE GASTON; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; J.S. MILLS; WASHINGTON STATE GRANGE,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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September 7, 2007

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REPLY BRIEF FOR THE PETITIONERS

In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), this Court invalidated the California blanket primary. This ruling was extended to Washington in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003). *Jones* isolated, as the crucial constitutional defect in the blanket primary, the fact that all primary voters were choosing each party's nominees. However, the Court stated that it would be constitutional to conduct a primary in which "[e]ach voter, regardless of party affiliation, [could] vote for any candidate, and the top two vote getters . . . move[d] on to the general election." *Jones*, 530 U.S. at 585. The Court stated that this primary was permissible because "[p]rimary voters are not choosing a party's nominee." *Id.* at 586. After a single experiment with an open primary, which limited voters to a single party, the citizens of Washington decisively passed Initiative 872—doing what this Court deemed permissible in *Jones*.

The political parties opposed Initiative 872 and now challenge the initiative on the grounds that it allows candidates to state a party preference on the ballot. The parties claim that that fact makes Initiative 872 a party nominating process, and that it unconstitutionally associates parties with candidates they dislike. The parties are wrong on both counts. Initiative 872 does not nominate party candidates, and the candidates are, by law, stating their preference, not a party affiliation. The parties may nominate their candidates as they choose, and those candidates may compete in the primary for a spot on the general election ballot.

1. The Top-Two Qualifying Primary Does Not Choose Political Parties' Nominees

a. The Political Parties Are Free To Choose Their Nominees As They Wish

The political parties contend that they are compelled to use the top-two qualifying primary to select their nominees. R. Br. 14; D. Br. 33. Their contention is

not supported in the law or the record. Initiative 872 does not govern how parties choose their candidates. Prior to Initiative 872, the law required the political parties to choose their nominees in the primary election. The law provided that candidates' names for a "partisan office for which a primary was conducted *shall not be printed on the ballot for that office at the subsequent general election unless the candidates receive . . . a plurality of the votes cast for the candidates of his or her party for that office at the preceding primary.*" 2003 Wash. Sess. Laws page no. 775 (ch. 111, § 919) (emphasis added). Initiative 872 repealed this law. JA 420 (Initiative 872 § 17(4)). Under Initiative 872, any citizen qualified to hold office can file a declaration of candidacy and participate in the primary election. JA 414 (Initiative 872 § 9).

The Republican Party claims that: "State election officials admitted that under I-872, there is no 'partisan nomination process separate from the primary.' JA 104-11." R. Br. 18. The Democratic Party makes a similar argument. D. Br. 37. The parties are referring to letters written by local county election officials not the Washington Secretary of State who is responsible for adopting regulations implementing Initiative 872. Wash. Rev. Code § 29A.04.611. The parties also misstate the content of the letter. Each local county election official stated that at "this time, I am not aware of *any language associated with the Initiative* that contemplates a partisan nomination process separate from the primary." JA 105, 107, 109, 111 (emphasis added). This statement is accurate. Initiative 872 does not address how parties will nominate their standard-bearers. It repealed the state law requiring the parties to use the primary election.

Under Initiative 872, each "political party organization may adopt rules governing its own organization and the nonstatutory functions of that organization." JA 418 (Initiative 872 § 14). Thus, the political parties may select their nominees by whatever private means they choose, and provided that their

nominees file a declaration of candidacy, they will appear on the primary election ballot.

b. Initiative 872 Is Fundamentally Different From The Blanket Primary In *Jones* Because It Separates The Process Of Selecting Party Nominees From The Process Of Winnowing Candidates

The political parties claim that the top-two qualifying primary enacted by Initiative 872 is constitutionally indistinguishable from the blanket primary struck down in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). R. Br. 15; D. Br. 33. This claim is not well taken. In *Jones*, the Court held that permitting all voters to participate in the determination of each party's nominees violated the political parties' First Amendment right to freedom of association. *Jones*, 530 U.S. at 577.

The top-two qualifying primary is different from the blanket primary in *Jones* because it separates the process of selecting party candidates from the process of winnowing the candidates who will advance to the general election. By separating the nominating process from the winnowing process, Initiative 872 operates like the blanket primary upheld in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), which required "that a minor-party candidate *be nominated by convention, but imposed the additional requirement* that, *as a precondition to general* [election] *ballot access*, the nominee for an office appear on the primary election ballot and receive at least 1% of all votes cast for that particular office at the primary election." *Munro*, 479 U.S. at 191-92. Although any voter could vote for the Socialist Workers Party candidate in the primary, this did not violate the party's right of association because the voters were not selecting the Socialist Workers Party candidate—they were only deciding whether that candidate would advance to the general election.

The blanket primary upheld in *Munro* served as a winnowing process with respect to minor party candidates, who were *nominated* by private party processes. The top-two qualifying primary expands this principle to all candidates filing for office. Anyone can file a declaration of candidacy and participate in the top-two qualifying primary, if he or she is qualified to hold the office. JA 414 (Initiative 872 § 9). Access to the primary ballot is thus available to party nominees who file a declaration of candidacy, but access does not depend on being the nominee of a political party. The political parties select their standard-bearers by whatever process they choose. The top-two vote-getters advance to the general election. JA 412 (Initiative 872 § 6). By advancing the top-two vote-getters to the general election, Initiative 872 simply winnows the field of candidates who qualify for the general election ballot.

The difference between the top-two qualifying primary and the prior blanket primary is fundamental and material. By separating the nominating process from the winnowing process, the candidates of the major parties are no longer guaranteed a place on the general election ballot.[1]

The Republican Party recognizes that this change is material. According to the Republicans, if Initiative 872 had been in place in prior elections, some Republican candidates would not have advanced to the general

---

[1] Relying on *Jones*, the Republican Party argues that the loss of the right to advance to the general election reduces its right to nominate candidates to a right to endorse. R. Br. 36-38. In *Jones* this Court rejected the argument that the burden imposed by the blanket primary was "minor because [the parties were] free to endorse and financially support the candidate of their choice in the primary." *Jones*, 530 U.S. at 580. However, in *Jones* the parties' nominee was determined in the primary. Under Initiative 872, the parties nominate their candidates using whatever procedure they choose. When a party supports its candidates in the primary election, it is not endorsing the candidates for the party nomination–it is supporting its nominees to advance to the general election.

election because the top-two vote-getters would have stated a preference for the Democratic Party. R. Br. 31.

The Republican Party acknowledges that the prior blanket primary, as it applied to minor parties, separated the nominating and winnowing process. R. Br. 35 n.14. The Republicans argue that *Munro* is distinguishable because, under the prior blanket primary, no other candidate on the ballot could run under the Socialist Workers Party standard. R. Br. 35. However, as explained below (*infra* pp. 5-11) the ability of a candidate to state his or her political party preference on the ballot does not mean that the candidate is competing for the party nomination in the primary.

c. Allowing A Candidate To State His Or Her Party Preference On The Ballot Does Not Make The Top-Two Qualifying Primary A Nominating Primary

Under Initiative 872, candidates may, if they choose, state a party preference on their declaration of candidacy. JA 415 (Initiative 872 § 9(3)). If a candidate states a party preference, it will be shown in conjunction with the candidate's name on the primary and general election ballots and in the state voters' pamphlet. JA 414, 417 (Initiative 872 §§ 4(3), 12). The party preference is provided for the information of the voters. JA 414 (Initiative 872 § 7 (3)). The Republican Party argues that the statement of party preference is no different from candidates seeking a party's nomination under the prior blanket primary. R. Br. 15-18, 44-45.

The Republicans' argument is based on its claim that party affiliation permeates Initiative 872. They essentially argue that the terms "preference" and "affiliation" are interchangeable, so that candidates who state a party preference are really seeking the party's nomination. This argument fails for at least two reasons. First, as explained above (*supra* pp. 3-5), Initiative 872 does not select party standard-bearers. The top-two vote-

getters advance to the general election without regard to party. The two successful candidates may both have the same party preference or no party preference. Second, the Republicans' argument fails because the terms "preference" and "affiliation" have distinct meanings, and Initiative 872 is precise in its use of these terms. The term "preference" means:

> "**2 a** : the act of preferring or the state of being preferred : choice or estimation above another : higher valuation or desirability . . . ." *Webster's Third New International Dictionary* 1787 (unabridged ed. 2002).

Preference means preferring or valuing one thing over another. Thus, a candidate who is an Independent may state a preference for the Republican Party in his or her declaration of candidacy because the candidate prefers the Republican Party over the Democratic Party—even though the candidate is a member of neither party. On the other hand, the term "affiliation" means:

> ": the act of affiliating : the state or relation of being affiliated" *Webster's Third New International Dictionary* 35 (unabridged ed. 2002).
>
> "**[1]af·fil·i·ate** . . . **1 a** : to attach as a member or branch : bring or receive into close connection . . . b : to join as a member : ASSOCIATE . . . ." *Webster's Third New International Dictionary* 35 (unabridged ed. 2002).

Thus, while a candidate with a preference prefers one party over another, a candidate with an affiliation is associated with or has joined the party.

Initiative 872 does not use these terms interchangeably as the Republican Party claims. For example, the term "affiliation" is only used twice in the Initiative in sections 3 and 5. Both sections provide that voters have the

> "right to cast a vote for any candidate for each office without any limitation based on the party

> preference or affiliation, of either the voter or the candidate." JA 411, 412 (Initiative 872 §§ 3(3); 5).

In these sections, the terms "preference" and "affiliation" are used with precision. In casting a ballot, voters are not limited by the party preference or party affiliation of the candidate or by the party preference or affiliation of the voter.

A candidate who states a party preference is not claiming to be a member of that party, nor is the candidate seeking the nomination of that party. The candidate is simply providing some information to voters. The parties are not entitled to simply assume, as the Republicans do, that voters will mistake a stated preference for an affiliation, or that voters will treat every candidate as seeking the nomination of the party for which the candidate has stated a preference.

The Democratic Party argues that, historically, printing a party name in conjunction with a candidate's name on the ballot indicated an association between the candidate and the party. D. Br. 33-35. A candidate who was not formally associated with a party could appear on the ballot, but not as a candidate of that party. According to the Democrats, the reason for this was that the "law gives [the voter] the right to assume that, if he wishes to vote for all the candidates of the Republican party, all he has to do is to make his check mark opposite the words "Republican Ticket," at the head of its group of candidates . . . ." D. Br. 33 (quoting *State ex rel. Bloomfield v. Weir*, 31 P. 419, 420 (Wash. 1892)).

This point is irrelevant. Voters have not had the option of voting for a "straight ticket" for over fifty years. 1947 Wash. Sess. Laws page no. 181 (ch. 77, § 1). Washington's primary and general election ballots are organized by office, not by party. Voters must vote separately for each office—there is no provision for straight ticket voting with a single mark by a party name. The fact that Washington once permitted straight ticket

voting does not prevent it from changing from a nominating primary to a winnowing primary.

The Democratic Party also argues that the plain meaning of the terms "nominate" and "primary" establish that Initiative 872 nominates party candidates. D. Br. 36. This argument also fails. First, Initiative 872 does not use the term "nominate" because it does not nominate party candidates. Second, the term "primary" or "primary election" is defined in the Initiative as "a procedure for winnowing candidates for public office to a final list of two as part of a special or general election." JA 412 (Initiative 872 § 5). By its terms, Initiative 872 does not nominate party candidates. Rather, it winnows all the candidates who seek an office to the top-two vote-getters, who will advance to the general election.

d. Other Election Laws Do Not Support The Claim That Initiative 872 Nominates Party Candidates

Both the Republican and Democratic Parties argue that other Washington laws relating to elections support their claim that Initiative 872 nominates party candidates. They point to laws governing filling vacancies in office (Wash. Const. art. II, § 15) and establishing major party status (Wash. Rev. Code § 29A.04.086), as well as campaign finance laws (Wash. Rev. Code §§ 42.17.020, .040, .510, 640). R. Br. 17-18; D. Br. 6-8, 33-35.

These laws do not support the claim that the top-two qualifying primary nominates party candidates. First, the parties' argument incorrectly assumes that a successful candidate who states a party preference will be treated as the party's nominee, even if he or she is not the party nominee. For example, when filling a vacancy in office, one of the requirements is that the new officer be of "the same political party as the legislator or partisan county elective officer whose office has been vacated . . . ." Wash. Const. art. II, § 15. The political parties assume that if the officer vacating the office expressed a preference for the Republican Party, but was not in fact

chosen by the Republican Party as its nominee, that the replacement must also be a Republican. From this assumption, they draw the conclusion that preference is the same as nomination. But this assumption is wrong. The policy of article II, section 15 is to honor the judgment of the voters in choosing an officer nominated by a particular political party. Thus, if a candidate won election as the Republican nominee, and later switched to the Democratic Party, the successor would have to be a Republican, not a Democrat. By the same token, under Initiative 872, if the Republican nominee loses the election, but another candidate who has stated a preference for the Republican Party wins, the successor need not be a Republican, because the Republican nominee did not win the election.

The parties also point to the procedure for qualifying as a major party. Wash. Rev. Code § 29A.04.086 provides that a major party is a "political party of which at least one *nominee* for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year." (Emphasis added.) Again, this statute applies only to the *nominee* of the party. If a candidate is elected who stated a preference for a party but is not the party nominee, his or her votes will not confer major party status.

Second, with regard to other laws, such as those governing campaign finance, the purpose of Initiative 872 was not to change the entire election system. The purpose was to separate the process of nominating party candidates from the process of winnowing the candidates who will advance to the general election. Because of the injunction entered against it in this litigation, the State has not had an opportunity to conduct an election under Initiative 872 and has had no need to examine and determine how its campaign finance laws would be administered in light of the Initiative. Speculation as to

how the State might implement or amend its laws to accommodate the top-two primary is not a basis to invalidate Initiative 872.

The Republican Party relies heavily on statements made by the Washington State Grange, the sponsor of Initiative 872, that the purpose of the measure was to have more moderate candidates and to continue the prior blanket primary. R. Br. 13-14, 47-48. The Democratic Party also refers to statements by the Grange. D. Br. 34. The parties argue that Initiative 872 is invalid because the Grange had an improper purpose—to propose an election system indistinguishable from the blanket primary.

Even if the political parties had accurately characterized the intent of the Grange, the statements made by the Grange could not overcome the plain text of the Initiative.[2] The Court "ascertain[s] the purpose of a statute by drawing logical conclusions from its text, structure, and operation." *Tuan Anh Nguyen v. I.N.S.* 533 U.S. 53, 68-69 (2001). Here, the text and structure of Initiative 872 establish that it is not a party-nominating primary. Given the clarity of Initiative 872, the Grange's campaign statements are not relevant. Relying on *Edwards v. Aguillard,* 482 U.S. 578 (1987), the Republican Party appears to argue that Initiative 872 is invalid because the Grange had an improper purpose when it sponsored the measure. R. Br. 47. However,

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[2] The parties are not accurate when they claim that the purpose of the Grange was to reenact the prior blanket primary. The Grange "specifically drafted Initiative 872 to conform to this ruling by the US Supreme Court [in *Jones*]." JA 79. The Grange stated that under "Initiative 872, the two candidates with the most votes in the primary win and go on to the general election ballot." JA 78. The Grange concluded that "[t]his system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Because the voters are not selecting party nominees, a qualifying primary does not interfere with any constitutionally-protected interest of a political party." JA 79.

Aguillard dealt with the "purpose prong of the *Lemon* test [which] asks whether [a] government's actual purpose is to endorse or disapprove of religion." *Aguillard*, 482 U.S. at 585. Under the *Lemon* test, the government's purpose in enacting a law is relevant to the law's constitutionality. However, this case does not involve a claim that the State has violated the Establishment Clause of the First Amendment. Establishment Clause case law has no application to the facts of this case, and the purpose of the Grange is irrelevant. *United States v. O'Brien*, 391 U.S. 367, 383 (1968), *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 205, 11 P.3d 762, 780 (2000).

2. In Enacting Initiative 872, Washington's Voters Permissibly Valued Broad Voter Choice Over Political Party Control Of The State's Primary

In the early days of the Republic there were no laws governing how the political parties selected their candidates. The direct primary was born as a tool to take the process of selecting candidates for public office out of the hands of the party elites and to place it into the hands of the general electorate. Pet. Br. 5-6. However, the political parties are slowly chipping away at the ability of the voters to select candidates for public office. For example, in this case, the Republican Party has also challenged the open primary that the State adopted after the blanket primary was invalidated and before Initiative 872 was enacted. Under the open primary law, any person who qualifies for an office may file a declaration of candidacy to participate in the Republican primary. JA 539 (Wash. Rev. Code § 29A.24.031, 2004 Wash. Sess. Laws page no. 1225 (ch. 271, § 158)). The Republican Party claims that this statute violates its right of association because Republican Party rules, limit who can participate in the Republican primary. JA 13 (Republican Complaint ¶ 37). For example, under Republican Party rules when "an incumbent seeking reelection obtains a vote of more than 66% at a nominating convention . . . the

incumbent shall be the only candidate certified [on the primary election ballot]." JA 90 (Republican Party Rule 5).[3] Thus, the Republicans claim a constitutional right to nominate only one candidate for every office, thus subverting the fundamental purpose of primary elections, turning back the clock on a century of reform designed to increase citizen participation.

Parties in other states are also attempting to limit citizen participation in the primary process. In *Mississippi State Democratic Party v. Barbour*, 491 F. Supp. 2d 641, 660 (N.D. Miss. 2007), the Democratic Party successfully argued that the state's closed primary violated its First Amendment right of association because the state did not have "mandatory party registration" or "mandatory voter identification[.]" In *Miller v. Brown*, 465 F. Supp. 2d 584, 595 (E.D. Va. 2006), the Republican Party successfully argued that the state's open primary violated its right of association.

Whether these claims by the political parties will ultimately succeed remains to be seen. However, it is clear that the political parties read this Court's decision in *Jones* to mean that they can require the state to impose significant restrictions on the state-run party-nominating primaries. The First Amendment does not require the citizens of a state to cede to the political parties the authority to select candidates for public office, and the parties do not have a First Amendment right to have the state provide primaries in which they select their standard-bearers.

Election law cases involve two distinct and fundamental rights. The first is "the right of individuals to associate for the advancement of political beliefs . . . ." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). The second is "the right of qualified

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[3] The district court did not resolve this claim because it was not properly raised in the stipulated statement of legal issues agreed to by the parties. Resolution of the claim is stayed pending the outcome of this case. JA 826-28.

voters, regardless of their political persuasion, to cast their votes effectively." *Id.* The Democratic Party apparently does not take issue with this principle, as it makes no mention of it. On the other hand, the Republican Party appears to believe that only political parties have First Amendment rights related to elections—and that the citizens of the State of Washington have none. Thus, it argues that the right of qualified voters to cast their votes effectively, regardless of party, calls into question the laws of other states that conduct closed and open primaries. R. Br. 42-43. In fact, in *Jones* and other cases, this Court has held that the voters' right to cast an effective ballot gives way to the political parties' right of association to choose their own nominee.

However, the state retains the power to remove all party organizational involvement from the formal primary election process so that "[c]andidates qualify for the primary ballot under a neutral signature requirement or other criterion, and the top two candidates who garner votes in the primary advance to the general election." Nathaniel Persily, *Toward A Functional Defense Of Political Party Autonomy*, 76 N.Y.U. L. Rev. 750, 812 (2001). Under this primary system, the parties are placed "outside the formal process of candidate selection, and the state will not hijack the parties' nomination processes." *Persily*, 76 N.Y.U. L. Rev. at 812. This system fully protects the parties' right to nominate their candidates, but the ability of the parties' candidates to automatically advance to the general election gives way to the peoples' right to cast an effective ballot.

In enacting Initiative 872, Washington's voters have chosen to value broad participation and choice in selecting those who will serve them in public office by separating the process of nominating party candidates from the process of winnowing the field of candidates who will advance to the general election. This fully protects the parties' First Amendment right of association, but it

also protects the peoples' right to freely select candidates for public office.

3. The Top-Two Qualifying Primary Does Not Infringe Upon The Political Parties' Associational Rights

a. The Political Parties' Right Of Association Does Not Include The Right To Prohibit A Candidate From Stating His Or Her Party Preference On The Ballot

The Republican Party claims that the presence on the ballot of a candidate who expresses a preference for the Republican Party violates the party's First Amendment right of association by creating a forced association between this candidate and the party and its chosen nominee. R. Br. 20-29, 39-41. The Democratic and Libertarian Parties make similar claims. D. Br. 35-36, 38-43; L. Br. 18-20. These claims should be rejected because allowing a candidate to state his or her party preference on the ballot neither creates an association between the candidate and the party of any sort that this Court has recognized, nor impermissibly interferes with the legitimate associational interests of the parties.

The Republicans rely on *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), to support their forced association claim. These cases are inapposite. In each, an organization claimed that the government interfered with its right of expressive association because the government either directly compelled speech by the organization or compelled the organization to accept as members persons whose very participation would transmit a message on behalf of the organization with which the organization disagreed. In *Pacific Gas*, the state required a "privately owned utility company to include in its billing envelopes speech of a third party

with which the utility disagree[d]." *Pacific Gas*, 475 U.S. at 4. In *Hurley*, the state required "private citizens who organize[d] a parade to include among the marchers a group imparting a message the organizers d[id] not wish to convey." *Hurley*, 515 U.S. at 559. In *Dale*, the state required the Boy Scouts to admit a homosexual to "adult membership" and the position of "assistant scoutmaster[.]" *Dale*, 530 U.S. at 644. The Court held that this forced inclusion would communicate the Boy Scouts' acceptance of homosexuality when, in fact, the organization did not accept it. By contrast, a candidate's statement of party preference on the ballot does not require the political parties to accept that candidate as a member or to make any kind of statement.

The Republican Party claims that the statement of party preference "forces the Republican Party to include messages and speakers in its 'parade' that may be contrary to the message the Party wants to send." R. Br. 39-40. The problem with this argument is that the election ballot is not the Republican Party's parade. It is the State of Washington's parade. In *Hurley*, the parade was sponsored by a private organization, and this Court held that participation by a Gay and Lesbian unit "would likely be perceived as having resulted from the [organization's] customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well." *Hurley*, 515 U.S. at 575. There is no reason to believe that the Court would have reached the same conclusion if the parade was sponsored by the government instead of a private organization. In that case, the message of the Gay and Lesbian unit could not be attributable to the private organization.

This case is analogous to *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006). *Rumsfeld* concerned the Solomon Amendment, 10 U.S.C.A. § 983 (Supp. 2005), which provided that "if any part of an institution of higher education denies

military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds." *Rumsfeld*, 547 U.S. at 51. The Court rejected the claim that the presence of military recruiters on campus violated the institution's First Amendment right of association. According to the Court, the "compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 63. The Court also explained that "where the Boy Scouts' freedom of expressive association was violated when a state law required the organization to accept a homosexual scoutmaster, the statute here does not force a law school to accept members it does not desire. [Military recruiters] "are outsiders who come onto campus for the limited purpose of trying to hire students–not to become members of the school's expressive association." *Id.* at 49. As in *Rumsfeld*, Washington's ballot does not require the party to convey a message with which it disagrees, or to accept a candidate as a party member.[4]

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[4] The Republican Party argues that the state has no valid interest in placing information on the ballot that may influence how voters exercise their vote. Presumably, the party has no similar objection when party nominees are designated on the ballot. In any event, the cases upon which the party relies are not on point. The Republicans rely on *Anderson v. Martin*, 375 U.S. 399 (1964), and *Cook v. Gralike*, 531 U.S. 510 (2001). In *Anderson*, Louisiana required the candidate's race to appear on the ballot. The Court held that this requirement bore no relationship to qualification for office and that its compelled inclusion on the ballot constituted race discrimination prohibited by the Fourteenth Amendment. *Anderson*, 375 U.S. at 403-04. At issue in *Cook* was a required statement that candidates for Congress did not support term limits for United States Senators and Representatives. *Cook*, 531 U.S. at 514. The Court held that the requirement simply was not within the state's delegated power under the Elections Clause, United States Constitution Article 1, Section 4, Clause 1, to regulate the procedural mechanisms of elections for Senators and Representatives. *Cook*, 531 U.S. at 525-26. Initiative 872 is not similarly flawed. It does not promote invidious discrimination or, as in *Cook*, attempt to handicap candidates by

The Republicans also argue that the statement of party preference violates the Party's right to exclude unwanted persons from competing for the Party's nomination. The Republicans rely on decisions of the court of appeals that Republican and Democratic Parties could prevent David Duke and Lyndon LaRouche from competing for their nomination for President of the United States. *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992); *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996); *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998). These cases are authority only for the proposition that parties can exclude candidates from their convention or other nominating procedure. The cases do not support the claim that a candidate cannot state a party preference in a primary that does not nominate party candidates like Initiative 872.[5]

The parties are left to argue that the statement of party preference violates their First Amendment right of association because it will cause confusion among the voters. On its face, Initiative 872 makes it clear that a candidate's statement of party preference, if any, is just that, not a statement that the candidate is a member of a particular political party or the nominee of the party. The

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requiring them to include information on the ballot potentially harmful to their electoral prospects.

[5] The Republican Party argues that the statement of party preference is inconsistent with two decisions of the Washington Supreme Court; *State ex rel. LaFollette v. Hinkle*, 131 Wash. 86, 93, 229 P. 317 (1924), and *Most Worshipful Prince Hall Grand Lodge of Washington v. Most Worshipful Universal Grand Lodge, A.F. & A.M.*, 62 Wash. 2d 28, 44, 381 P.2d 130 (1963). These decisions have nothing to do with a statement of party preference on the ballot. Rather, they deal with naming new entities. *Hinkle* holds only that a new political party may not name itself after a person without his or her consent. *Hinkle*, 131 Wash. at 93. *Grand Lodge* holds only that "a group of persons [that] seeks to form an organization . . . cannot adopt the name of an already established order which has gained a highly esteemed reputation in the minds of the public." *Grand Lodge*, 62 Wash. 2d at 44. A candidate's statement of party preference has nothing to do with forming an organization using the names of the political parties.

political parties are not entitled simply to assume that there will be confusion under Initiative 872. Initiative 872 contemplated spending up to one million dollars to conduct a media campaign to inform voters about the new primary election. JA 401. The primary and general election ballots and voters pamphlet could also reiterate that the statement of preference is not a statement of association. The Secretary of State has already redesigned the declaration of candidacy to reflect that candidates are not seeking a party nomination and are only declaring a party preference—not a party association. JA 592-93. The Court should not invalidate the top-two qualifying primary on the assumption that voters will mistakenly believe that a statement of party preference means that the candidate is associated with a political party.[6]

b. The Political Parties' Right of Association Does Not Include A Right Of Access To The General Election Ballot

The Republicans argue that Initiative 872 imposes an unreasonably high threshold to advance to the general election. R. Br. at 30-32. According to the Republicans, their nominee would have to receive one-third of the vote in the primary election to be one of the top two vote-getters. This Court has recognized that the "freedom to associate as a political party, a right we have recognized as fundamental . . . has diminished practical value if the party can be kept off the ballot." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). However, Initiative 872 imposes virtually no restrictions on obtaining access to the primary ballot. A candidate must be qualified to hold the office and pay the filing fee or present signatures equal in number to the dollar amount of the filing fee. JA 414 (Initiative 872 § 9). This

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[6] It also is difficult to understand how a voter's mistaken understanding of a voting system, about which the voter has full opportunity to be accurately informed, could convert the system from a valid one to an invalid one.

right to compete in the primary election satisfies the party's right to ballot access. The primary is "not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates." *Storer v. Brown*, 415 U.S. 724, 735 (1974).

The Republicans' real complaint is not that they do not have access to the ballot, but that their nominees no longer automatically advance to the general election. Republican Party nominees do not have a First Amendment right to a place on the general election ballot. The Republican nominees have the same right and ability as any other candidate to persuade voters to advance him or her to the general election.

The cases the Republicans rely on for this argument concern minor party candidates who were not allowed to participate in the primary election. For that reason, they are inapposite. Under those circumstances, the only opportunity to go before the voters was in the general election, and the court therefore struck down laws that imposed too high a burden on ballot access. *Williams v. Rhodes*, 393 U.S. 23, 24 (1979), (striking down Ohio "election laws [that] made it virtually impossible for a new political party . . . or an old party . . . to be placed on the state ballot to choose electors pledged to particular candidates for the Presidency and Vice Presidency of the United States."); *Illinois Board of Elections v. Socialist Workers Party*, 440 U.S. at 187 (striking down Illinois election law "insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago" to appear on local election ballot). By contrast, Initiative 872 offers virtually wide-open access to the primary election ballot. Where that is the case, no candidate and no party nominee has a right to proceed to the general election ballot, unless he or she is advanced there by the voters.

4. Initiative 872 Is Not Subject To Strict Scrutiny And Advances Important State Interests

In our opening brief, we explained that Initiative 872 was not subject to strict scrutiny because it does not impose any substantial burden on the associational rights of the political parties. Pet. Br. 40-41. None of the parties respond to this argument. The Democrats simply assume that strict scrutiny applies because they argue that the State has not established a compelling state interest. D. Br. 21, 26-29. The Republicans and Libertarians do not discuss the applicable standard at all.

"[W]hen a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). That is the case with Initiative 872. Unlike the blanket primary in *Jones*, Initiative 872 does not nominate party candidates. And the statement of party preference on the ballot neither compels speech by the parties, nor compels the parties to accept as members, candidates with whose messages they disagree. If Initiative 872 imposes a burden on the parties, it is minimal and furthers the State's interest in an informed electorate and in broad voter participation and choice in the State's primary election system. Pet. Br. 47-49.

5. Conclusion

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted.

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NO. 06-713 and NO. 06-730

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE GRANGE,
Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON STATE; ET AL.,
Respondents.

STATE OF WASHINGTON, ET AL.,
Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY OF PETITIONER WASHINGTON STATE GRANGE

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SUMMARY OF ARGUMENT

The political parties do not refute the two specific points dispositive to the Constitutional question presented for review.

First, they do not refute that the free speech protected by our First Amendment includes a person's freedom to utter in public the name of the political party he or she personally prefers.

Second, they do not refute the fact that, *as written*, the text of Washington's top-two statute does nothing more than allow such a personal preference statement to publicly appear on the ballot.

Instead, their arguments are all premised on the notion that an election ballot that looks like the one illustrated below implies that the party designation appearing next to a person's name identifies that person as the named party's candidate, representative, or nominee:

STATE OF WASHINGTON BALLOT

INSTRUCTIONS TO VOTERS:

1. Use a dark pen to fill in the square next to your choice.
2. You may vote for only one candidate for each public office.

PUBLIC OFFICE – GOVERNOR:

- ☐ **Bob Smith** (R)
- ☐ **Jane Doe** (D)

PUBLIC OFFICE – ATTORNEY GENERAL:

- ☐ **Chris R. Jones** (D)
- ☐ **Chris D. Jones** (R)

But the above form of the top-two ballot was never printed.

Nor is it mandated by the statute that the political parties attack.

Instead, Washington's top-two statute allows the ballot to look like either one of the following two examples:

STATE OF WASHINGTON BALLOT

INSTRUCTIONS TO VOTERS:

1. Use a dark pen to fill in the square next to your choice.
2. You may vote for only one candidate for each public office.
3. The political party name shown next to a candidate identifies the party which that candidate listed as being his or her party preference when filing for office. It is not a statement by the political party identifying that candidate as being a party member or being that party's candidate, nominee, or representative in this election.

PUBLIC OFFICE – GOVERNOR:

- ☐ **Bob Smith** (prefers Republican Party)
- ☐ **Jane Doe** (prefers Democratic Party)

PUBLIC OFFICE – ATTORNEY GENERAL:

- ☐ **Chris R. Jones** (prefers Democratic Party)
- ☐ **Chris D. Jones** (prefers Republican Party)

STATE OF WASHINGTON BALLOT

INSTRUCTIONS TO VOTERS:

1. Use a dark pen to fill in the square next to your choice.
2. You may vote for only one candidate for each public office.
3. The political party name shown next to a candidate identifies the party which that candidate listed as being his or her party preference when filing for office. It is not a statement by the political party identifying that candidate as being a party member or being that party's candidate, nominee, or representative in this election.

PUBLIC OFFICE – GOVERNOR:

- ☐ **Bob Smith** (this person's Declaration of Candidacy states: "my party preference is the Republican Party")
- ☐ **Jane Doe** (this person's Declaration of Candidacy states: "my party preference is the Democratic Party")

PUBLIC OFFICE – ATTORNEY GENERAL:

- ☐ **Chris R. Jones** (this person's Declaration of Candidacy states: "my party preference is the Democratic Party")
- ☐ **Chris D. Jones** (this person's Declaration of Candidacy states: "my party preference is the Republican Party")

Washington law, moreover, provides parties ample opportunity to contest the proposed wording of any ballot in court on an expedited basis – ensuring that if a political party objects to the wording of any election ballot under Washington's top-two statute, that objecting party can secure prompt judicial resolution of that objection on an expedited basis.

In short, the hypothetical ballot upon which all of the political parties' arguments are ultimately based (the first example on page 1 above) is not the ballot mandated by the State statute they attack.

Instead, a ballot like the second or third example on pages 2 and 3 above is allowed. And a ballot like either one of those two examples would eliminate the political party's constitutional objection in this case – for either one would dispel the political parties' underlying premise that the ballot voters see under Washington's new top-two statute would imply that a party name appearing on that ballot identifies the corresponding person as that named party's candidate, nominee, or representative.

The reasoning pressed by the political parties' briefing is really a premature *as applied* challenge to the State of Washington's yet-to-be-applied top-two election statute. The lower federal courts' reaching out to preemptively strike down the entirety of this State statute *on its face* (rather than waiting to see if the ballots issued under this statute actually precipitate the Constitutional concerns asserted by the political parties) violated (rather than upheld) core Constitutional principles underlying our nation's form of government.

DISCUSSION

A. The Political Parties Do Not Refute That First Amendment Free Speech Includes The Freedom To Utter In Public The Name Of The Political Party You Personally Prefer.

The political parties do not dispute the First Amendment's broad protection of free speech – especially in the political arena. They accordingly do

not dispute that the free speech protected by our First Amendment includes a person's freedom to utter in public the name of the political party he or she personally prefers.[1]

That makes sense – for this Court has consistently held that the First Amendment protects a broad array of speech that is much more offensive or objectionable than merely uttering generic words like "Democrat" or "Republican".[2] For example, holding that the First Amendment protects:

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[1] As this Court reiterated in the free speech case filed by the (Minnesota) Republicans, speech by persons running for public office "is at the core of our electoral process and of the First Amendment freedoms, not at the edges" – and thus "the notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. *Republican Party of Minnesota v. White*, 536 U.S. 765, 781-82 (2002) (italics in original). The Ninth Circuit accordingly acknowledged below that every citizen running for office has a fundamental right to express his or her political party preference. Grange Pet. App. 26a.

[2] The Libertarian Party Of Washington State also asserts that it has a trademark right to prevent persons from uttering the word "Libertarian". But that common law or statutory argument does not relate to the Constitutional question accepted for review in this case. It also has no legal merit. For example, trademark law limits the use of trademarks in commercial transactions – it does not ban use in political speech. See, e.g., *Bosley Medical Institute v. Kremer*, 403 F.3d 672, 676-80 (9th Cir. 2005) (permitting non-commercial use of plaintiff's trademark on website criticizing plaintiff's product), *Tax Cap Committee v. Save Our Everglades*, 933 F. Supp. 1077, 1079, 1081-82 (S.D. Fla. 1996) (permitting PAC to use a petition form that closely resembles one developed by a different PAC because the defendant PAC was not using that form for commercial purposes); *Bland v. Fessler*, 88 F.3d 729, 739 (9th Cir. 1996) (commercial speech has less First Amendment protection that political speech). A person stating the name of a political party to identify the party he or she prefers would also fall under trademark law's exception for comparative advertising or nominative use. See, e.g.,

- a person publicly broadcasting pornography over the internet;[3]
- a person publicly accusing a political opponent of "blackmail" or being a "traitor to his God, his country, his family, and his class";[4]
- a person publicly disseminating "virtual" child pornography;[5]
- a person publicly disclosing an illegally taped telephone call about teachers' union negotiations;[6]
- a person publicly distributing a parody of a respected minister having a drunken

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Smith v. Chanel, 402 F.2d 562, 563, 564-69 (9th Cir. 1968) (permitting defendant to advertise his perfume by stating it duplicated 100% the plaintiff's well-known Chanel #5); *Playboy Enterprises v. Welles*, 279 F.3d 796, 799-803 (9th Cir. 2002) (permitting Ms. Wells to use the phrase "Playboy Playmate of the Year 1981" to identify herself on her commercial website because her use of the Playboy Playmate trademark was a nominative use); *New Kids on the Block v. News America*, 971 F.2d 302, 306 (9th Cir. 1992) (permitting comparative use because "it is often virtually impossible to refer to a particular product for purposes of comparison, criticism, point of reference or any other such purpose without using the [allegedly infringed upon] mark"). See generally Appellant Wash. State Grange Ninth Circuit Opening Brief at 20-24 (9th Cir. Docket No. 05-35774) (Sept. 19, 2005); Appellant Wash. State Grange Ninth Circuit Reply Brief at 10-11 (9th Cir. Docket No. 05-35774) (Nov. 8, 2005).

[3] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 882 (1997).

[4] *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 13 (1970); *Letter Carriers v. Austin*, 418 U.S. 264, 284-286 (1974).

[5] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002).

[6] *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001).

incestuous bout with his mother in an outhouse.[7]

- a person publicly wearing in a courthouse a jacket stating "FUCK THE DRAFT. STOP THE WAR" – with this Court noting that "one man's vulgarity is another's lyric", and that to forbid particular words invites "a substantial risk of suppressing ideas in the process."[8]

Since the First Amendment protects speech such as the above, there can be no dispute that it also protects a person's freedom to utter in public the name of the political party he or she prefers.[9]

B. The Political Parties Do Not Refute The Fact That, *As Written*, The Text Of Washington's Top-Two Statute Does Nothing More Than Allow Such A Personal Preference Statement To Publicly Appear On The Ballot.

The political parties' briefs do not refute the fact that, *as written*, the text of Washington's top-two statute does nothing more than allow an

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[7] *Hustler Magazine v. Falwell*, 485 U.S. 46, 48, 57 (1988).

[8] *Cohen v. California*, 403 U.S. 15, 25, 26 (1971).

[9] See also *Cantwell v. State of Connecticut*, 310 U.S. 296, 310 (1940) (First Amendment protects not only accurate speech in the political arena, but also exaggeration, vilification, and outright false statements); *Public Disclosure Commission. v. 119 Vote No! Committee*, 957 P.2d 691, 695 (Wash. 1998) (State law cannot prohibit falsity in political debate).

office-seeker's personal preference statement to publicly appear on the ballot.[10]

Nor do they dispute the fact that, unlike the election laws of other States,[11] the text of

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[10] See Brief of Petitioner Washington State Grange at 38-39 (quoting sections 4, 7(3), 9(3), and 12 of Initiative 872 and the Washington Administrative Code provisions promulgated to implement that statute). Indeed, the Washington State Democratic Central Committee's briefing emphasizes the fact that this statute's ballot title stated the party designation on a ballot would be the ***candidate's*** party ***preference***. Brief For Respondent Washington State Democratic Central Committee at 45; accord Appellee State Democratic Central Committee's Ninth Circuit Response Brief at 3:5-7 (9th Cir. Docket No. 05-35774) (Oct. 26, 2005).

[11] See Brief of Petitioner Washington State Grange at 45-46 (explaining the **Connecticut** statute in *Tashjian*, the **Ohio** statute in *Rosen*, the **Georgia** statute in the two *Duke* cases, the invalidated **Washington** law in *Reed*, and the invalidated **California** law in *Jones*). The **New York** statutes at issue in the *Plonski* and *Chambers* cases cited by Respondents were similar, for they expressly stated the party name and emblem on the ballot designated that party's candidates on the ballot. N.Y. Laws, 1954, Ch. 433, §1 ("party shall select a name and emblem to distinguish the candidates of that party for public office ... [and an under 15 letter abbreviation] ... to be used upon the ballot") (version at time of *Plonski v. Flynn*, 222 N.Y.S.2d 542 (1961)); N.Y. Laws, 1922, Ch. 588, §20 (same) (version at time of *Chambers v. Greenman*, 58 N.Y.S.2d 637 (1945)). As this Court's members may also be aware from personal experience, the current election statutes of California, Illinois, New Jersey, New York, Massachusetts, New Hampshire, Maryland, Virginia, and Missouri similarly provide that a party designation on the ballot identifies the corresponding person as that party's nominee. The California, Illinois, New Jersey, and New York statutes require that voters of each party receive a primary ballot only for that party, with the candidates on that party ballot pre-selected by a petition of that party's voters or that party's nominating committee, and the party designation on the subsequent general election ballot showing the party by which that person was nominated in his or her party's primary. Cal. Election Code §§8068, 13110; 8148, 13105; 10 Ill. Comp. Stat. 5/7-10, 5/16-2; N.J. Stat. Ann. §§19.23-5, 19.14-8; N.Y. Election Law §§6-104, 6-110, 7-104. The Massachusetts and New Hampshire statutes provide that a party

Washington's top-two statute does not provide that a party name appearing next to a person's name on the ballot identifies that person as the named party's candidate, representative, or nominee. As the lead Respondent unequivocally admitted in its Ninth Circuit briefing below, ***"No state has a primary system similar to Washington's."***[12]

This statutory fact is fatal to the political parties' *facial* challenge here. As this Court expressly explained in *Jones*, States have broad latitude to allow primary voters to vote for whomever they want – just as long as the State does not couple that free choice with the partisan result of designating the winners of that primary to be the party nominees on the November ballot. 530 U.S. at 572-73 & n.4. Indeed, this Court explained that such a partisan result is the "constitutionally crucial" distinction between a partisan party-nominating primary and a nonpartisan candidate-winnowing primary. 530 U.S. at 585-86.

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designation on the general election ballot reflects nomination by that party at the party primary (or party caucus), and allows only party members (or unaffiliated voters) to vote on a party's primary ballot. Mass. Gen. Laws ch. 53 §§8, 34, 37-38; N.H. Rev. Stat. §§655.21, 656.9. Maryland's statute provides that a party name shall be indicated only on the ballot "of a candidate who is a nominee of a political party." Md. Code, Election Law § 9-210. Virginia's statute provides that a party designation on the ballot must be supported by a letter from "the state chairman of a recognized political party certifying that a candidate is the nominee of that party." Va. Code Ann. §24.2-613. And Missouri's statute establishes a "Montana" style party-nominating primary as noted in the Grange's prior briefing. Mo. Rev. Stat. §115.397.

[12] Appellee Republican Party Ninth Circuit Response to Grange Brief at 15:9 (9th Cir. Docket No. 05-35774) (Oct. 19, 2005) (emphasis added).

As counsel of record for the lead Respondent in this case has candidly acknowledged, a two-stage, candidate-winnowing primary is precisely what the text of Washington's new law enacted.[13] The top-two statute that Washington enacted to comply with this Court's ruling in *Jones* is not unconstitutional on its face because, *as written*, it fully complies with this Court's ruling.[14]

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[13] JA 692 (Initiative 872 "enacted a two-stage election with a 'winnowing' primary under which all candidates who file would appear on the ballot in the first stage, and a run-off between the top two in the second stage"). Accord, Initiative 872, §5 (redefining "primary" as follows: " 'Primary' or 'primary election' means a procedure for winnowing candidates for public office to a final list of two as part of a special or general election") (Grange Pet. App. 118a); Wash. Admin. Code 434-262-012 up until the federal court enjoined I-872 ("Pursuant to Chapter 2, Laws of 2005 [Initiative I-872], a partisan primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election. The candidate who receives the highest number of votes and the candidate who receives the second highest number of votes at the primary election advance to the general election, regardless of the candidates' political party preference. .... Voters at the primary election are not choosing a political party's nominees.") (Grange Pet. App. 140a).

[14] Despite the political parties' suggestion to the contrary, the fact that Washington specifically drafted a new statute to cure its prior statute's constitutional defect does not render the State's new statute unconstitutional – for States are free to draft new statutes to cure a prior statute's constitutional defect. E.g., *Information Providers Coalition v. FCC*, 928 F.2d 866, 871 (9th Cir. 1991) (upholding new dial-a-porn statute drafted in response to prior version's invalidation); *United States v. Dorsey*, 418 F.3d 1038, 1045 (9th Cir. 2005) (upholding new school-zone-gun statute drafted in response to prior version's invalidation); *Bown v. Gwinnett County School District*, 112 F.3d 1464, 1470 (11th Cir. 1997) (upholding new minute-of-silence statute drafted to say "quiet reflection" after invalidation of prior version saying "silent prayer or meditation").

C. The Theoretical Ballot Envisioned By The Political Parties' *As Applied* Reasoning Is Not Mandated By The State Statute They Attack.

1. Washington's Top-Two Statute Allows The Ballot To Be Clearly Worded To Ensure That It Does Not Imply The Office-Seeker's Personal Preference Statement Is Instead The Party's Designation Of That Person As Its Candidate, Representative, Or Nominee.

The political parties' right-of-association argument has superficial appeal only if one envisions the ballot under Washington's top-two statute as looking like the first example illustrated on page 1 of this Reply Brief. But no such ballot was ever printed, and no such ballot is mandated by Washington's top-two statute.

Washington's top-two statute states that a person running for certain public offices "may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name." Initiative 872, §4 (Grange Pet. App. 117a).[15]

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[15] This statute further requires the candidate to sign the declaration form he or she files "stating that the information provided on the form is true". Initiative 872, §9(5) (Grange Pet. App. 121a); see also the Declaration of Candidacy promulgated by the Secretary of State, which required the following statement of truth to be notarized: "I declare that this information is, to the best of my knowledge, true." (Grange Pet. App. 137a-138a).

What the resulting ballot would actually look like has never been determined because the federal courts enjoined this new State statute's implementation before a single Declaration of Candidacy was filed or a single ballot was prepared for printing.

That is important because the ballot ultimately used under Washington's top-two statute could easily include language that addresses the political parties' concern that a person's statement of his or her personal party preference might be misconstrued to imply an associational tie between that person and the party which that person states he or she prefers.

For example, the top of the ballot could include an explanation that: "The party indication next to a person's name is only an expression of that person's personal preference. It does not indicate that that person is a nominee of that party, that the party prefers that person, or that there is any associational tie whatsoever between that person and the party he or she prefers."

As another example, the ballot could include the following statement next to each person's name: "This person stated when filing to run for this office that he/she prefers the Democratic party. This statement of personal preference does not mean that he/she is a nominee, representative, or candidate of the Democratic party, nor does it mean that he/she is a member of or in any way associated with the Democratic party."

Or, as another example, the ballot could simply be printed to look like either the second or third illustrations on pages 2 and 3 of this Reply Brief.

In short, the ballot under Washington's top-two statute can be worded to avoid the implication of associational ties lying at the heart of the political parties' arguments.

2. Washington Law Also Provides The Political Parties Ample Opportunity To Contest That Wording In Court Before Any Actual Ballot Is Printed Under Washington's Top-Two Statute.

Washington law also provides ample opportunity for prompt judicial review (and revision) of ballot wording if a party believes that the wording proposed for a ballot is not legally sufficiently.

For example, the Washington State Superior Court for Thurston County (the county in which the State Capitol is located) frequently hears challenges to the wording of election ballots, and promptly issues its ruling on (or revision of) that ballot language under the prompt time clock specified by Washington's Ballot Title Statute.[16] Although those

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[16] RCW 29A.72.080 (directing the Thurston County Superior Court to render a decision within five days of the filing of the challenge to proposed ballot wording). The Thurston County Superior Court docket confirms that that court has averaged over nine ballot title challenges a year these past three years. For example, it had at least eleven ballot title challenge suits within just the first four months of 2004: *In re Ballot Title for I-860* (No. 04-2-00096-1) (Jan. 16); *In re Ballot Title for I-864* (No. 04-2-00212-2) (Feb. 3); *In re Ballot Title for I-883* (No. 04-2-

suits have concerned the portion of a ballot relating to initiative or referendum measures (rather than the portion of that ballot relating to public offices), the court's frequent experience with such ballot wording challenges confirms that Washington's State Court system is well equipped to promptly hear and rule upon objections to how an impending election ballot is proposed to be worded.

The political parties in this particular case, moreover, have also confirmed that they are well experienced in securing prompt court rulings on election matters in Washington State – having repeatedly secured expedited next-day trial court rulings and next-week State Supreme Court rulings in their dueling series of challenges to the recount process conducted for Washington's 2004 Gubernatorial election.[17]

00425-7) (Mar. 4); *In re Ballot Title for I-884* (No. 04-2-00544-0) (Mar. 22); *In re Ballot Title for I-885* (No. 04-2-00561-0) (Mar. 23); *In re Ballot Title for I-889* (No. 04-2-00633-1) (Apr. 5); *In re Ballot Title for I-890* (No. 04-2-00669-1) (Apr. 8); *In re Ballot Title for I-891* (No. 04-2-00670-5) (Apr. 8); *In re Ballot Title for I-892* (No. 04-2-00675-6) (Apr. 12); *In re Ballot Title for I-894* (No. 04-2-00782-5) (Apr. 21); *In re Ballot Title for I-895* (No. 04-2-00792-2) (Apr. 22).

[17] Specifically, when the Washington State Republican Party was dissatisfied with the way the machine recount was going to be conducted, it filed an emergency injunction action in federal district court on Saturday evening (Nov. 20), and secured a court hearing that ruled on its injunction request the following Sunday (Nov. 21). Case Docket available electronically, *Republican Party v. King County et al.*, (W.D. Wash. case no. 04-cv-02350 RSM). Then, when the Washington State Democratic Central Committee became dissatisfied with the way the subsequent hand recount was going to be conducted, it filed an emergency action in the Washington Supreme Court on Friday (Dec. 3), secured a Washington Supreme Court hearing on Monday (Dec. 13), and

In short, the political parties' can secure prompt judicial review of the legal sufficiency of whatever wording the State ultimately proposes for the ballot under Washington's top-two statute. But at this point, due to the federal court injunction the political parties secured in this case, no ballot wording has even been proposed – never mind established.

The political parties' reasoning that associational ties might be implied by the wording of the hypothetical ballot they envision makes for interesting theoretical discussion. But it does not present an actual ballot that is ripe for judicial review. The political parties' *as applied* reasoning for why Washington's top-two statute must be declared invalid in its entirety is at this point utterly premature.

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received the Supreme Court's ruling on Tuesday (Dec. 14). *McDonald et al. v. Reed et al.*, 103 P.3d 722 (Wash. 2004) and case docket no. 763216. Then, when the Washington State Republican Party became dissatisfied with a different aspect of the way that hand recount was going to proceed, it filed an emergency injunction action in Pierce County Superior Court on Thursday (Dec. 16), secured a hearing granting that injunction on Friday (Dec. 17), which the Washington State Supreme Court then promptly heard on appeal and resolved with a ruling on Wednesday (Dec. 22). *Republican Party v. King County et al.*, 103 P.3d 725 (Wash. 2004) and case docket no. 763992.

3. The Federal Courts' Reaching Out To Preemptively Strike Down This State Statute *On Its Face* (Rather Than Waiting To See What The Ballot Actually Looks Like When The State *Applies* This New State Statute) Violated Our Federal Constitution's Core Principles.

This Court has historically been reluctant to entertain *facial* attacks on statutes (i.e., claims that a statute is invalid in all of its applications), instead normally proceeding to determine whether a law is unconstitutional *as applied* in the particular case before the Court.[18]

This well established principle of requiring parties to present their concerns in a concrete *as applied* challenge rather than a speculative *facial* challenge is illustrated by two of this Court's decisions relating to the McCain-Feingold campaign finance law.

This Court's first decision rejected a series of constitutional challenges noting that they should be presented in *as applied* cases based on actual facts

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[18] See, e.g., *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-503 (1985); *United States v. Grace*, 461 U.S. 171, 175 (1983); *Nixon v. Administrator of General Services*, 433 U.S. 425, 438-39 (1977); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 52 (1966); *United States v. Raines*, 362 U.S. 17, 20-24 (1960); and *Watson v. Buck*, 313 U.S. 387, 402 (1941) (cited in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 774-75 (1988) (White, J., Stevens, J. and O'Connor, J. dissenting). That is in large measure due to the fact that a facial challenge requires a showing that the challenged statue is "invalid in toto – and therefore incapable of any valid application." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (emphasis added).

rather than in a *facial* challenge based on hypotheticals and speculation. This Court accordingly:

- rejected a claim that the interaction between federal and state laws would result in the federal act's soft-money prohibition being overbroad, because the interaction between federal and state laws was better addressed in an "as applied challenge";[19]
- rejected as speculative a claim that the act interfered with speech and associational rights of minor parties, because "a nascent or struggling minor party can bring an as applied challenge" if the federal act interfered with its ability to advocate effectively;[20]
- rejected a claim that the act's reduction in funds might "drive the sound of the recipient's voice below the level of notice", because such a claim could be raised in an as applied challenge if it actually occurred;[21] and
- rejected a claim that the act's disclosure obligations interfered with associational rights, because those concerns could be adequately addressed in an as applied challenge if interference actually occurred.[22]

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[19] *McConnell v. FEC*, 540 U.S. 93, 157 & n.52 (2003).

[20] *McConnell*, 540 U.S. at 158-59.

[21] *McConnell*, 540 U.S. at 173.

[22] *McConnell*, 540 U.S. at 197-200.

In contrast, three years later this Court addressed (and ruled on) a properly presented *as applied* challenge to that McCain-Feingold act. *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2670 (2007).

Although the political parties make light of the Grange's emphasis on core Constitutional principles, such as separation of powers and federalism, the political parties' briefs do not refute the significance of those core principals in this case. Nor do they refute the reasoned judicial restraint that necessarily flows from those core principles (e.g., avoiding constructions of a statute that would render it unconstitutional, and invalidating only that portion of a statute that must be invalidated to prevent it from being stricken down in its entirety).

These core Constitutional principles underlying the federal judicial branch's respect for the legislative branch and the flexibility granted to each of the individual States similarly require that if this Court is to invalidate a State statute, it should do so based on actual facts presented in an *as applied* challenge instead of hypothetical facts imagined in a *facial* challenge. Indeed, this Court has long held that ruling on the constitutionality of legislation "is not to be exercised with reference to hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22 (1960); see also *Nixon v. Admin. of General Services*, 433 U.S. 425, 466 (1977) (rejecting a facial challenge to a statute based on associational rights prior to promulgation of administrative regulations that could adequately protect those rights, and noting that "there [is] no reason to believe that the mandated regulations

when promulgated would not adequate protect" those rights).

In this case, the State statute *as written* fully complies with this Court's ruling in *Jones*. The federal courts' reaching out to preemptively strike down this State statute *on its face* (instead of waiting to see what any ballot actually looks like when the State *applies* this new State statute) violated (rather than upheld) our federal Constitution's core principles.

CONCLUSION

In *California Democratic Party v. Jones*, 530 U.S. 567, 585-586 (2000), this Court explained that States are free to adopt an open, top-two primary system as long as that system does not specify the partisan result of selecting the political parties' candidate, representative, or nominee.

The people of the State of Washington took this Court at its word and overwhelmingly enacted such a State statute. A new statute that, as counsel of record for the lead Respondent in this case has explained, "enacted a two-stage election with a 'winnowing' primary under which all candidates who file would appear on the ballot in the first stage, and a run-off between the top two in the second stage." Supra footnote 13.

The fact that no other States have (yet) replaced their traditional party-nominating primary system with such a top-two winnowing system does not make Washington's new, non-traditional system

unconstitutional – for our federal Constitution protects (rather than prohibits) the freedom of each State's citizens to adopt new and novel systems different from those of their peers.

Nor does the fact that a single (severable) part of Washington's statute allowing an office-seeker to publicly disclose the name of the party he or she personally prefers transform Washington's otherwise constitutional top-two statute into an entirely unconstitutional one. Our First Amendment does not prohibit a State from allowing a person running for public office to disclose the name of the party he or she personally prefers on the ballot – especially if that ballot looks like the second or third examples illustrated on pages 2 and 3 of this Reply Brief.

The Washington State Grange, the sponsor of the top-two statute at issue in this case, therefore respectfully requests that this Court reverse the Ninth Circuit judgment striking down Washington's top-two statute in its entirety.

RESPECTFULLY SUBMITTED.

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WASHINGTON STATE GRANGE,

Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY; DIANE TEBELIUS; BERTABELLE HUBKA; STEVE NEIGHBORS; MIKE GASTON; MARCY COLLINS; MICHAEL YOUNG; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; and J.S. MILLS,

Respondents.

STATE OF WASHINGTON; ROB McKENNA, Attorney General; and SAM REED, Secretary of State,

Petitioners,

v.

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On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CALIFORNIA DEMOCRATIC PARTY AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

By the written consent of all the parties, the California Democratic Party ("CDP") respectfully submits this amicus curiae brief to assist the Court in its consideration of the issues presented in this case.[1] CDP is the duly authorized and officially recognized Democratic Party of the State of California. It is an unincorporated association of individuals who have joined together to advance common political beliefs. For more than a century, CDP has nominated candidates for public office either by convention or by primary election. Participation in CDP's primary elections is limited by the terms of CDP's by-laws. While those by-laws previously limited participation to CDP members, they were recently changed to allow independents to participate in the primary as well.

Throughout this process, CDP spends considerable time and expense to ensure that voters clearly understand what CDP stands for and what it means to be a "Democrat" in California. CDP is also intimately acquainted with how so-called "blanket primary" election systems, even "modified" systems like Initiative 872, can severely burden political parties' core associational rights guaranteed by the First Amendment to the United States Constitution. CDP served as lead plaintiff in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) precisely because it believed that the primary system adopted by the voters in that case substantially interfered with the Democratic

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[1] Pursuant to Sup. Ct. R. 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than amicus has made a financial contribution to the preparation or submission of this brief.

Party's ability to maintain and protect the integrity of the message conveyed by the use of the label "Democrat."

CDP believes that the "modified" blanket primary adopted by the Washington voters presents exactly the same threat to the associational rights of the political parties because it eliminates the party's ability to control its message (and its messengers) in the same way. CDP thus has a significant interest in the Court's consideration of the blanket primary system at issue in this case.

SUMMARY OF ARGUMENT

A political party's message is its *raison d'etre*. Also known as a "platform," it is the public expression of the common political beliefs around which its members associate in the first place and which, ultimately, directs their collective action. Voters who share the beliefs espoused by the Democratic Party platform reasonably expect that when "Democratic" candidates on the ballot are elected to office, they will vote in ways that are consistent with the voter's views on such vital public policy areas as the environment, health care, and education. The Democratic Party platform is also used to recruit new voters to support Democratic candidates and candidates who will advance those views. Simply put, the Party's message – as advanced through its candidates – reflects "what it means to be a Democrat."

A political party's ability to control its message is essential to its ability to carry out its core functions. This Court's decisions have thus long held that the First Amendment guarantees political parties the freedom to control their internal affairs. This freedom necessarily

includes the right to identify those candidates who are qualified to carry the party label on the ballot, free from outside interference. *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981). Thus, in *Jones*, this Court struck down a blanket primary system adopted by California voters because it violated a political party's "right not to associate" by allowing non-members to determine the identity of the party's standard bearer.

The blanket primary system that Initiative 872 would establish strikes at the heart of the very same associational freedoms that animated this Court's decision in *Jones*. Its unabashed purpose is to directly effectuate a change in the political parties' ideologies by forcing those who carry the party labels to espouse views that appeal to non-party adherents. It seeks to accomplish this goal by permitting anyone *without qualification* to affiliate with the Democratic Party on the primary ballot by expressing a "preference" for the Party. All voters, regardless of their party preference,[2] are then permitted to determine which of these self-identified Democratic candidates, if any, will appear on the general election ballot. Initiative 872 would therefore effectively establish a partisan primary system in which the political parties themselves are denied any formal role in determining the identity of their standard bearers.

This system unquestionably imposes severe burdens on political parties' protected First Amendment freedoms. By wresting control over who may hold themselves out on

[2] The State of Washington does not register voters on the basis of their affiliation with any particular political party. WASH. REV. CODE § 29A.04.205 (2007).

the ballot as a "Democratic" candidate from party adherents and giving it to non-party members, Initiative 872 would have the direct effect of weakening the link between such candidates and the Democratic Party's platform. A candidate with views totally anathema to the Party's could nonetheless express his or her "preference" on the ballot for the Democratic Party. By forcing the Democratic Party to be associated on the ballot with such a candidate, Initiative 872 would lead to the perception among voters that the Party tolerates, or even approves of, the views expressed by such a candidate. Over time, this system would seriously degrade the meaning of the Democratic Party's label until, eventually, it ceases to be a reliable indicator of the views underlying the Party's very existence.

The State of Washington and Initiative 872's sponsor, the Washington State Grange, attempt to defend the measure's intended effect of altering political party ideology by clothing it in the language of "nonpartisan" and "party preferences." They point to language in this Court's decision in *Jones* suggesting that such a system would serve the State's asserted interest in greater access to the ballot and improved choice for voters. But Initiative 872 is not a nonpartisan primary because it allows all voters to choose among a pool of self-identified party candidates to determine who will be associated with a given party on the general election ballot. And the argument that a "party preference" does not convey the same impression of formal association as a party designation in the minds of the voters merely elevates form over substance, particularly since Washington law does not otherwise provide a formalized method for determining whether a candidate is "affiliated" with or a "member" of a particular party. The

interests identified by the State in support of Initiative 872 are neither compelling nor even sufficiently important to outweigh the substantial interference with the parties' associational rights caused by the measure.

Nor is it any answer to the severe associational burdens imposed by Initiative 872 to say that parties are free to engage in independent speech to differentiate candidates. This Court's decisions are clear that such a "forced response" is antithetical to the freedoms guaranteed by the First Amendment. This Court's decisions have also recognized that party endorsements are no substitute for the ability of the party to select its own standard bearer. Moreover, to the extent parties are forced to engage in such differentiation, the frequency and degree to which they can communicate that message is limited by state and federal campaign finance laws.

In sum, Initiative 872 seeks to retain the advantages associated with party labels on the ballot, including the benefit of voter "cues" to differentiate among the candidates' positions, without providing political parties the independent ability to control the content of the message attributed to them through the use of those labels. Consequently, Initiative 872 shares the same constitutional defect as the blanket primary struck down in *Jones* and should likewise be declared unconstitutional. The decisions of the district court and the Ninth Circuit should thus be affirmed.

ARGUMENT

I. The First Amendment Necessarily Guarantees A Political Party the Right to Determine and Control the Content of Its Message

This Court's decision in *Jones* reaffirmed that the freedom guaranteed to a political party by the First Amendment to control the content of its message flows directly from the nature of a political party as a vehicle for collective political expression. Political parties exist as a means for groups of individuals to band together "in furtherance of *common* political beliefs." *Jones*, 530 U.S. at 574 (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-15 (1986)) (emphasis added). The associational freedom that the First Amendment guarantees a political party thus "necessarily presupposes the freedom to identify the people who constitute the association, and *to limit the association to those people only.*" *Id.* (quoting *La Follette*, 450 U.S. at 122) (emphasis added). Without these freedoms, a political party would be unable to "limit control" of its actions and expressions to persons who share the common political goals for which the party was formed in the first place. *Id.* at 575 (quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW 791 (1978)). The existence of political parties as effective tools for collective political expression therefore depends on their ability to control their message.

The method by which political parties communicate their message to the public at large is through the candidates who carry the party's label on the ballot. These "standard bearers" are the face of the party in their community and serve as a central point of contact between the community and the political party. Parties choose candidates "in order to *represent* their ideas and interests

in the election." Joint Appendix filed by parties in *Jones* at 57 (Expert Report of Bruce Cain, hereinafter "*Jones* App. __.") (emphasis added). Recognizing the critical role that candidates play in disseminating a party's message, this Court in *Jones* observed that a political party's associational rights are at their zenith in the "process of selecting its nominee." *Jones,* 530 U.S. at 575. This is because the selection of a party's standard bearer will "often determine[] *the party's positions* on the most significant public policy issues of the day." *Id.* (emphasis added). Even when those positions have been pre-determined, for instance by the content of the party's platform, it is the candidate to whom the task of "winning [] over" the general electorate to the party's views is entrusted. *Id.*

In *Jones*, the Court struck down California's blanket primary because it unconstitutionally infringed on these principles. The blanket primary system adopted by California voters through Proposition 198 permitted non-party members to determine the identity of the candidate who would ultimately carry a given party's label on to the general election. *Jones*, 530 U.S. at 577. Proposition 198 thereby "force[d] political parties to associate with – to have their nominees, *and hence their positions*" determined by non-party members. *Id.* (emphasis added). Citing Proposition 198's "*intended* outcome [] of changing the parties' message," the Court noted that it "could think of no heavier burden on a political party's association freedom." *Id.* at 581-82 (original emphasis). Thus, California's blanket primary system severely burdened a political party's associational rights by stripping it of the autonomy to control its message vis-à-vis the selection of its standard bearers.

Relying on the Court's pre-*Jones* decisions articulating these same principles, the circuit courts have consistently upheld a party's right to determine which individuals are qualified to use the party's label on the ballot. Thus, the Eleventh Circuit upheld the right of members of the Georgia Republican Party to prevent David Duke from appearing as a Republican candidate in Georgia's Republican presidential preference primary. *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992). The court found that Duke's asserted "right to associate with an 'unwilling party'" was outweighed by the Republican Party's right to identify the persons "who constitute" the party and to exclude from it those persons who, in the party's determination, do not share its political beliefs. *Id.* at 1530 (citing *La Follette*, 450 U.S. at 121-22). This right to "self-determination" included the right to "select a standard bearer who best represents the party's ideologies and preferences." *Id.* at 1531 (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)).[3]

Similarly, the D.C. Circuit upheld the Democratic National Committee's right to determine who constitutes a "bona fide Democrat" for purposes of allocating delegates to the Democratic National Convention at which the Party's nominee for President is selected. *Larouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998). In so holding, the Court of Appeals noted the importance of "[a] party's effort to limit the list of candidates *who can represent themselves to the voters as Democrats*" as critical to the party's goal of

[3] The Eleventh Circuit subsequently rejected, on essentially the same grounds, a § 1983 challenge by Duke to the Georgia statute regulating presidential preference primary candidate selection. *Duke v. Massey*, 87 F.3d 1226, 1232-33 (11th Cir. 1996).

winning elections. *Id.* at 996 (emphasis added). These efforts allow the Party to "define its values, distinguish them from those of its competitors, and thereby attract like-minded voters." *Id.*

While these decisions may have involved more traditional partisan forms of candidate selection, the principle underlying the holding of each is the same as in *Jones*: the integrity of a political party's identity necessarily depends on the party's ability to control how its message is conveyed to the electorate and by whom.

Consistent with its treatment of political parties, this Court's decisions have also recognized that private organizations generally enjoy a First Amendment right to "autonomy over [their] message." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 576 (1995). As with the associational rights discussed in *Jones*, this right protects an organization's ability to control the persons with whom they are publicly associated. "[T]hat choice is presumed to lie beyond the government's power to control." *Id.* at 575. This right to autonomy is based on the principle that the integrity of a private organization's identity necessarily requires that it be free from government-compelled associations that could be "perceived" as signaling its acceptance of certain views. *Id.*

Thus, in *Hurley*, this Court held that the state could not constitutionally compel the private organizers of a St. Patrick's Day parade, the South Boston Allied War Veterans Council, to allow certain groups to march in the parade whose message was deemed inconsistent with the Council's desired message and whose inclusion might give the mistaken impression that the Council approved or

supported the groups' message. *Hurley*, 515 U.S. at 574-75. The Court recently reaffirmed this aspect of a private organization's protected First Amendment freedoms in concluding that deference must be given not only to an organization's "assertions regarding the nature of its expression," but also to the organization's "view of what would impair its expression." *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000) (citing *La Follette*, 450 U.S. at 123-24).

As the foregoing decisions illustrate, the First Amendment protects a political party's ability to define with whom and on what terms it associates as a necessary corollary of the right to shape the content of the party's own message. This includes the right to exclude from its ranks those whose views are inconsistent with the common principles shared by party members, and it also includes the right to exclude association with those whose public affiliation could lead to the perception that the party approves or supports views that the party may disagree with, or simply may not want to explicitly endorse.

II. Initiative 872 Severely Burdens A Political Party's First Amendment Right to Control Its Message

In reviewing the constitutionality of Initiative 872, the Ninth Circuit applied the balancing test this Court has set forth for determining whether a state election law violates associational rights. First, it weighed the "character and magnitude of the burden" that Initiative 872 imposes on the organization's associational freedoms. *Washington State Republican Party v. Washington*, 460 F.3d 1108, 1116 (9th Cir. 2006) (citing *Timmons v. Twin Cities Area New*

Party, 520 U.S. 351, 358 (1997)). In so doing, the Court of Appeals recognized that while "reasonable, nondiscriminatory" burdens do not trigger strict scrutiny, "severe" burdens do, and election laws that severely burden political parties' First Amendment rights must be "narrowly tailored and advance a compelling state interest." *Id.*

The Ninth Circuit correctly determined that Initiative 872 severely burdens the associational rights of political parties and is thus subject to strict scrutiny because it would establish an "overtly partisan" election system wherein candidates are permitted to self-identify with any political party on a primary ballot that is presented to the general electorate. *Id.* at 1118. It concluded that Initiative 872 creates a nonconsensual impression of association between the party and those candidates who choose to state their preference for it, therefore stripping the political parties of their ability to independently control their message and degrading the value and integrity of the party's label as an indicator of its message. In so doing, Initiative 872 also substantially interferes with parties' ability to effectively manage their internal affairs.

Significantly, this Court's decisions indicate that deference should be given to the views of the political party-plaintiffs that the burdens imposed by Initiative 872 would be severe. A court "may not constitutionally substitute its own judgment" for that of the political parties in characterizing the burden that a state election law will impose upon the parties' internal processes. *La Follette*, 450 U.S. at 124. *See also Dale*, 530 U.S. at 653 (noting that deference must be given "to an association's view of what would impair its mission"). The conclusion of each political party in this case that Initiative 872 would significantly burden its associational right is amply supported.

A. Initiative 872 Operates as a Partisan Primary that Severely Burdens the Political Parties' Associational Rights

In asserting that Initiative 872 is a permissible "nonpartisan" primary, the State of Washington and the Grange rely heavily on the description in *Jones* of a hypothetical nonpartisan blanket primary:

> Generally speaking, under such a system, the State determines what *qualifications* it requires for a candidate to have a place on the primary ballot – which *may include nomination by established parties and voter-petition requirements for independent candidates.* Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. *This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee.* Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness" – all without severely burdening a political party's First Amendment right of association.

Jones, 530 U.S. at 585 (emphasis added).

The Ninth Circuit correctly understood that the crucial attribute of the "nonpartisan system" described in *Jones* was the separation of the party's candidate-selection process from the primary election process. *Washington State Republican Party*, 460 F.3d at 1118. This does not mean, however, that anyone wishing to participate in the primary may unilaterally connect himself or herself to a particular party. The "qualifications" referred to in *Jones*

may include selection by the respective parties through a wholly private nominating process but it seems clear that, whatever process is used, it presumably includes *some mechanism* for determining that a candidate who holds himself or herself out as affiliated with the party is so in fact. Indeed, the need to have *the parties themselves* directly involved in the process is even more pressing in states like Washington where voters are not registered by party affiliation.[4] In the absence of either required party registration or a party candidate selection process, Initiative 872 virtually eliminates any party control over the use of its name (and message) by a candidate.

Petitioners assert that because Initiative 872 does not purport to "nominate" candidates, only "winnow" them, it is nonpartisan. (Wash. Br. 14; 19-21; 25-35.)[5] But this argument elevates form over substance. As the Ninth Circuit concluded, in all relevant ways contemplated by *Jones*, Initiative 872 operates like a "partisan" primary and, in so doing, exhibits the same fatal flaw that doomed California's primary. *Washington State Republican Party*, 460 F.3d at 1111.

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[4] The absence of party registration constitutes one significant difference between the Louisiana system and Initiative 872; unlike the latter, Louisiana law requires a candidate to be a registered member of the party that he or she affiliates with on the ballot. LA. REV. STAT. ANN. § 18:463A(1)(a) (2007). There appear to be other differences, not the least of which is the apparent support of the Louisiana political parties for the system and the fact that it governs only state elections. *See generally* John R. Labbé, *Louisiana's Blanket Primary After California Democratic Party v. Jones*, 96 NW. U.L. REV. 721 (2002).

[5] Citations to Petitioner State of Washington's brief are set forth as "Wash. Br. ___." Citations to Petitioner Washington State Grange's brief are set forth as "Grange Br. ___."

While cloaked in the nomenclature of a nonpartisan system, the blanket primary provided in Initiative 872 bears the same partisan characteristics and constitutional infirmities as the overtly partisan blanket primary struck down in *Jones*. As a threshold matter, by providing for the inclusion of party "preferences" on the ballot, Initiative 872 at the very least introduces the concept of partisanship into the election process. Under its terms, anyone can anoint himself or herself as the Democratic Party's ambassador to the electorate by simply expressing a "preference" for the Party. It provides no "qualifications" for this representation whatsoever. All voters, regardless of party affiliation, are then permitted to determine which of the candidates who have expressed their "preference" for the Democratic Party, if any, will appear on the general election ballot as being affiliated with the party and its beliefs. Thus, the practical effect of Initiative 872, like the blanket primary in *Jones*, is that all voters are permitted to select the identity of a party's standard bearer. And, just as in *Jones*, this system directly interferes with – and therefore burdens – the parties' associational rights to control their message.

In fact, one need look no further than Initiative 872's avowed purpose of altering the ideology of political parties and the candidates to conclude that it imposes a significant burden that must be subjected to strict scrutiny. In extolling voters to support the measure, the Grange explained that under its terms "[p]olitical parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." (JA 406 (Official Voters' Pamphlet)).[6] This intended outcome is

[6] Citations to "JA" refer to the parties' Joint Appendix.

indistinguishable in design and effect from that which the proponents of California's blanket primary sought to achieve, and what the Court described in *Jones* as imposing the highest imaginable burden on the political parties' associational rights. *Jones*, 530 U.S. at 581-82. The result is a system in which the value of the political parties' labels as indicia of their ideological footing is intentionally eroded, and their ability to effectively manage their internal affairs is severely compromised.

1. Initiative 872 Imposes A Severe Burden on a Party's Ability to Control the Message Conveyed to the Electorate

As evidence presented to the district court suggests, political parties expend considerable time and expense defining their platform and creating "a corresponding 'brand awareness' among the electorate for candidates identified as Democrats." (Berendt Decl. 5, ¶ 10:11-14.)[7] Central to this concept of "brand awareness" is the integrity of a party label as a symbolic expression of its core principles and beliefs. "Party labels provide a shorthand designation of the views of party candidates on matters of public concern." *Tashjian*, 479 U.S. at 220. When a party loses the ability to control the use of its label, it therefore loses control of its message, including "what the party stands for and what is communicated to the voters about the parties." *Jones* App. 60.

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[7] Citations to "Berendt Decl." refer to the Declaration of Paul J. Berendt in support of Plaintiff-Intervenor Washington State Democratic Central Committee's Motion for Summary Judgment submitted to the District Court, found at JA 243 *et seq.*

Permitting candidates to appear on the ballot alongside his or her "preferred" party label without qualification infringes on a political party's right to control its message by creating a forced impression of association between the party and a candidate whose views it may find repugnant. This Court's decisions have recognized that this type of forced public affiliation severely burdens an organization's right to autonomy over its message because it creates the perception of an association between the organization and persons or groups whose views it may not share. *Dale*, 530 U.S. 640; *Hurley*, 515 U.S. 557. Yet, this is precisely the type of associational impression that Initiative 872 would foist upon political parties.

Under Initiative 872, David Duke would be free to declare his "preference" for the Washington State Republican Party and Lyndon Larouche would be free to declare his "preference" for the Washington State Democratic Party, regardless of each party's desire not to affiliate with these candidates. In fact, it is precisely because, under Initiative 872, the labels are no longer reliable indicia of party affiliation or support, and because all voters participate in the primary election – even those who are hostile to the party's message – that candidates such as Mr. Duke and Mr. Larouche may be able to defeat the party's preferred candidate and proceed to the general election ballot – neither having the backing of their "preferred" party, but both nonetheless being able to carry the party label and its message with them.

In fact, the severity of the burden that this forced affiliation will impose on political parties is arguably even greater than the burden found in *Hurley* and *Dale* because the associational perception is conveyed not simply in a private setting, but via a state-printed ballot, upon which

voters typically rely for impartial and *accurate* information in exercising the franchise. The State's reasoning in support of Initiative 872 would essentially allow the War Veterans Council or the Boy Scouts to decline association with certain persons, but then allow the State to create precisely the same forced association in election materials distributed to millions of voters.

The district court was presented with evidence that misappropriation of the party's label was, in fact, a real danger in Washington. The Washington State Democratic Central Committee submitted a declaration by the Party's chair, Paul Berendt. Mr. Berendt stated that he was aware of an instance in which a longtime Republican activist *twice* sought and won the Democratic nomination based on his belief that it would be too difficult to directly challenge the Republican incumbent in the blanket primary. (Berendt Decl. 5, ¶ 10.) This individual was able to accomplish this "without ever speaking to a Democratic Party group or obtaining [any] Democratic endorsements." (*Id.*)[8] Under Initiative 872, there would be nothing to prevent situations like the one described by Mr. Berendt from becoming the norm in Washington.

2. Initiative 872 Undermines the Institutional Value of Party Labels

The absence of any meaningful check on who is identified on the ballot with a particular political party

[8] The record before this Court in *Jones* indicated that it is common for as many as 25% of voters to cross-over in Washington primaries. *Jones*, 530 U.S. at 578. In this case, Mr. Berendt testified in his declaration that this was consistent with his experience as a Democratic Party official. (Berendt Decl. 6.)

also degrades the institutional value that party labels and/or designations play in assisting voters in registering their policy preferences. Party labels provide the voters with important "cues" about the ideological dispositions of a candidate. *Jones* App. 57. This provides predictability for voters vis-à-vis the policies and actions they may reasonably expect a candidate to pursue if elected to office. *Id.* That predictability, however, is based squarely on the assumption that the ideology of the candidate is, in fact, consistent with the ideology of the party whose label he or she carries. When candidates who carry a party's label are selected by persons outside the party, it undermines that assumption and reduces the value of the party label as a source of information for voters.

Further, there is nothing to prevent a candidate from associating with one party during the election, but subsequently pursuing polices or espousing views that are contrary to the principles of the party with whom he or she has unilaterally associated. Under Washington law, most elected offices – executive and legislative – are classified as "partisan," WASH. REV. CODE § 29A.52.111 (2007), and certain partisan-connected benefits are provided by law. *See, e.g.*, WASH. CONST, art. II, § 15 ("person appointed to fill the vacancy must be from . . . the same political party as the legislator or partisan county elective officer whose office has been vacated . . . "). In the example provided by Mr. Berendt (a Republican running as a Democrat), it is unclear which party would be the "same party" as the office-holder, as neither registration nor the election process itself any longer makes this determination reliable.

More significant than any confusion connected with filling a vacancy, however, is the confusion likely to be

caused in the minds of voters where, once elected, a candidate associated with one party (through his or her stated "preference") pursues policies inconsistent with the stated party's views. At that point, a critical aspect of party identity – the expectation that, once elected, the party's standard bearers will pursue the public policies associated with the party – is completely eviscerated.

This Court recently acknowledged the importance of the party label in providing a meaningful statement about the candidate's philosophy. In *Clingman v. Beaver*, 554 U.S. 581 (2006), the Libertarian Party of Oklahoma ("LPO") challenged Oklahoma's semi-closed primary system as infringing on its right to invite registered members of other parties to participate in its candidate selection primary. *Id.* at 584-5. In rejecting the LPO's challenge, the Court explained that Oklahoma had a legitimate interest in preventing voters who "rel[y] on party labels as representative of certain ideologies" from being confused or misled. *Id.* at 594. Thus, the Court concluded that the State could prevent the LPO from opening up its primary in order to preserve "the LPO's imprimatur" as a reliable "index of its candidate's actual political philosophy." *Id.* at 595.

3. Initiative 872 Burdens a Party's Ability to Manage Its Internal Affairs

This Court's jurisprudence has consistently recognized the state's legitimate interests in confining a political party's intra-party conflicts to its own selection process in order to facilitate "political stability." *Anderson v. Celebrezze*, 460 U.S. 780, 801-3 (1983); *Storer v. Brown*, 415 U.S. 724, 736 (1974). This concept is rooted in the belief,

shared by the Founding Fathers, "that splintered parties and unrestrained factionalism may do significant damage to the fabric of government." *Storer*, 415 U.S. at 736. Thus, in *Storer*, this Court recognized California could prevent "sore losers" in state-sponsored party primary elections from appearing on the general election ballot in order to reserve the general election ballot "for major struggles" and "not [as] a forum for continuing intraparty feuding." *Id.* at 735.

While this interest has been articulated most frequently from the perspective of the state, it also protects the political parties' ability to effectively govern their internal processes by ensuring finality in the process of selecting the party's standard bearer. Initiative 872 would work contrary to these principles and would, in fact, facilitate "spoiler" candidates and the perpetuation of intra-party feuds – even where parties have resorted to wholly private processes for selecting their standard bearers. *Washington State Republican Party*, 460 F.3d at 1120, n. 19. As the hypothetical in the Ninth Circuit's opinion aptly demonstrates, since there are no qualifications for candidates who wish to appear in the primary, nothing prevents a loser in the party's chosen internal process from challenging, and perhaps besting, the party's chosen standard bearer, by appealing to non-party voters in the blanket primary. In this regard, evidence was presented to the district court suggesting that such "spoiler" candidacies and "vote-splitting" affects the party's ability to effectively control its message by forcing candidates to vary their positions in an effort to "campaign to the same small group of ticket splitters, rather than to their philosophical bases." (Berendt Decl. 7, ¶ 14.)

The presence of spoiler candidates and others who seek to misappropriate a party's label can also impact other facets of a party's internal affairs as well. One of the key functions of a political party is to mobilize resources and supporters to assist party candidates in winning elections. However, Initiative 872 weakens the bond between party adherents and their preferred candidates by minimizing the adherents' role in the selection of their standard bearer. For example, if the only "Democratic" candidate on the general election ballot owes his or her success more to votes from independents and/or other party members than from Democratic voters, Democratic Party members may grow disillusioned and refuse to work for or give resources to that candidate. When spoilers win, it is less likely that party members will want to organize and help out. (*See* Berendt Decl. 6, ¶ 11.) It is also likely to be more difficult to recruit like-minded candidates to bear the party name as "party" support is no longer meaningful.

Finally, political parties seek to elect candidates with similar ideologies and thereby provide a framework for cooperation among elected officials once in office. This is how political parties ensure their ability to engage in concerted policy-making. That framework breaks down where there is no reliable connection between the ideology and the elected officeholders. In fact, the incentive for an elected official to work cooperatively with other party members is weakened when his or her electoral success is owed to independents and other groups of voters, rather than voters in his or her nominal party.

B. Neither Use of the Term "Preference" Nor the Political Parties' Ability to Speak in Response Thereto Mitigates the Burdens Imposed by Initiative 872

The State of Washington and the Grange assert that since Initiative 872 involves only a party "preference" and does not expressly provide for the "nomination" of candidates, it is distinguishable from the partisan blanket primary struck down in *Jones*. (Wash. Br. 43; Grange Br. 6.) They offer no explanation, though, for why the associational meaning of the statement "I am a candidate of the _____ party" is any different from the voters' perspective than the statement "my party preference is _____." Indeed, they seem to concede just the opposite by asserting that the latter is intended to convey "information" to the voters. (Wash. Br. 49.) In fact, to the extent that providing "information" to the voters truly is the purpose of including party preferences, it is unclear how Initiative 872 adequately serves that goal unless the statement of party preference effectively ties the candidate in the voters' minds to the message or platform of the preferred party.

Washington also claims that Initiative 872 is not a partisan primary because its provisions expressly state that it is not intended to "determine the nominees of a political party" but serves instead as a "qualifying primary" that winnows the number of candidates for the general election. (Wash. Br. 41-43.) But saying it does not make it so. As the broader panoply of Washington law makes clear, partisan concerns pervade much of the State's governance structure. And, as the history of Initiative 872 illustrates, the measure was not so much a rejection of partisan politics as much as an attempt to preserve it while altering what was considered an

excessively ideological focus of the current political parties and their candidates. (JA 406.)

As a threshold matter, Washington's reliance on *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) for the proposition that Initiative 872 is merely a "qualifying primary" is misplaced. (Wash. Br. 42.) Under the elections system this Court upheld in *Munro*, minor party candidates were first required to be *nominated by party convention* before being permitted to participate in the primary election. *Munro*, 479 U.S. at 191-92. They then were subject to the "additional requirement" of garnering at least 1% of the vote at the primary election as precondition for access to the general election ballot. *Id.* Thus, for minor party candidates, participation in the primary legitimately served a "qualifying function." *Id.*

As discussed above, however, Initiative 872 does not require a candidate wishing to appear on the primary ballot to have first been nominated by a party and, in fact, contains no restrictions on the candidates' ability to suggest party affiliation, leaving selection of the party's representative(s) to the voters as a whole. Contrary to Washington's repeated assertions, Initiative 872 cannot be accurately characterized as serving merely a "qualifying function" within the meaning of the Court's use of that phrase in *Munro*.

Washington's claim that Initiative 872 is premised on a "major paradigm shift" that allows the State to "get out of the business" of regulating party selection likewise rings hollow. (Wash. Br. 32.) In fact, the State is attempting to have it both ways. On the one hand, it seeks the benefits of party labels – including their role as "cues" for voters and the participation of the parties in publicizing

and differentiating the candidates. On the other hand, however, it denies the parties any role in determining which candidates are permitted to invoke those cues. Indeed, if the State truly wanted to get out of the "party" business, it would not choose party preference as the singular piece of information it provides to voters at a critical juncture in the election process.

The Ninth Circuit properly recognized that a political party's ability to endorse or otherwise advocate on behalf of its true standard bearer does not mitigate the burdens imposed by Initiative 872. *Washington State Republican Party*, 460 F.3d at 1122 n. 22. In a slightly different context, this Court has held that the First Amendment protects a corporation from being compelled to distribute a message with which it disagrees because to do so would force it to immediately speak out and disavow the message. This kind of "forced response is antithetical to the free discussion that the First Amendment seeks to foster." *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 16 (1986). Yet this is precisely the type of "forced response" that Initiative 872 imposes upon the political parties if they are to stand any chance of differentiating between their preferred standard bearer and a candidate who identifies his or her "preference" for that party.[9]

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[9] This Court has also questioned the value of party "endorsements" as a means of curing the harm caused by allowing non-party members to select the candidates who will be associated with the party's name on the ballot. "The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee." *Jones*, 530 U.S. at 580. In addition, endorsements by party leadership "do not assist the party rank and

(Continued on following page)

Moreover, the parties' ability to communicate their message has been increasingly limited by state and federal campaign finance laws. As Justice Kennedy noted in his concurrence in *Jones*, such laws "place strict limits on the manner and amount of speech parties may undertake in aid of candidates." *Jones*, 530 U.S. at 588 (Kennedy, J, concurring). Many states, including California, limit the amount that can be raised by a political party in support of (or opposed to) candidates. *See, e.g.*, CAL. GOV'T CODE § 85303 (West 2007) (imposing $25,000 limit on contributions to a political party for candidate-related purposes). These limits necessarily reduce the amount of money that can be spent – and therefore the level of communication that can take place to voters – while measures such as Initiative 872 would increase the need for the parties to actively educate the public about the differences among the candidates claiming to "prefer" the party. In fact, the need for such public communication would be expanded from the general election to include the primary election, an election in which the parties would not typically be required to use their limited resources.

On the federal level, political parties are literally defined in relation to their candidates. 2 U.S.C. § 431(16) (2007) ("political party" is an organization or association "which nominates a candidate . . . whose name appears on the election ballot as the candidate" of such organization or association). Federal law also provides that a political party may make "coordinated party expenditures" which are much higher in amount than the coordinated expenditures (or contributions) that can be made

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file, who may not themselves agree with the party leadership, but do not want the party's choice decided by outsiders"). *Id.* at 581.

by ordinary non-party political organizations. 2 U.S.C. § 441a(d) (2007). In the last election, political parties were able to spend $39,600 on a candidate for the House of Representatives as opposed to a $5,000 limit for other political organizations. But 441a(d) money can only be used for a "general" election; it cannot be used in the primary when, under Initiative 872, the parties would need it the most to educate voters about *their* preferred candidates and differentiate among candidates expressing the same party preference. Finally, federal law exempts certain "grassroots" political activity for a party's "nominee" from the spending limits; under Initiative 872, if there is no such "nominee," it is unclear whether the expenses of such grassroots communications would continue to be exempt, creating a further limitation on the party's ability to publicize its support for, or opposition to, particular candidates using the party label.

Thus, to the extent appellants argue that the burdens imposed on political parties by Initiative 872 may be mitigated by the parties' own efforts to differentiate between their preferred standard bearers and those who would misappropriate their label, their arguments are constitutionally unsound and should be rejected.

III. The State Has Shown No Compelling Interest and Any Legitimate State Interests Are Outweighed by the Associational Rights of the Political Parties

The State of Washington suggests that any burdens imposed by Initiative 872 are justified by its interest in having qualified voters cast their votes effectively, regardless of their political persuasion, or its interest in an "[i]nformed electorate." (Wash. Br. 32; 30-33.) Not even the

State claims that these interests are compelling; even if these "interests" are legitimate, they are far outweighed by the burdens imposed on the political parties' rights of association.

Washington posits that Initiative 872 will assist voters in casting their votes effectively because it permits "broad access" to the primary ballot and because "voters are not limited to voting for the candidate of a single party." (*Id.* at 30.) However, the "increased access" here favors only candidates who wish to identify with a political party but who would not be selected by the party as its standard bearer, and voters outside the party who wish to influence the selection of the party's candidates. For party members who wish to see their true "standard bearer" in the general election, choice and "access" have actually been limited. Likewise, for party members who prefer that party candidate-selection be done by popular party vote rather than by a convention (or other non-public process), their choice and "access" have been limited.[10] Finally, for voters who wish to support independents and minor parties who previously were included in the general election but are now likely to be excluded in the "winnowing" process, choice and "access" are similarly reduced.

Indeed, it is precisely for these reasons that Initiative 872 effectively subverts the party's right to select its own standard bearer for the general election ballot: Any increase in the "choices" given to non-party voters comes directly at the expense of the party's right to self-determination.

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[10] *See, e.g.*, *Jones*, 530 U.S. at 581 (endorsements by party leadership "do not assist the party rank and file, who may not themselves agree with the party leadership, but do not want the party's choice decided by outsiders").

Under the guise of providing greater "choice" to voters, Initiative 872 exhibits precisely the same constitutional infirmity as the blanket primary struck down in *Jones*: By allowing all voters – regardless of their political persuasion – to "choose" which candidate will carry the party's label on to the general election ballot, it is the choice of those voters rather than the choice of the party members that is outcome-determinative. This is contrary to the Court's clear holding in *Jones* that the First Amendment protects the exclusive rights of political parties to select their standard bearer, free from outside interference.

Nor can the State legitimately assert that its interest in ensuring an "informed electorate" justifies the burdens imposed by Initiative 872's "party preference" provisions. While the State understandably seeks to downplay the connection between a candidate's stated party preference and any inference of "affiliation" or "membership" with the political party, the only possible informational value in providing such a "preference" to voters lies in the perceived connection between the values espoused by the party and those of the candidate. But Initiative 872 provides no mechanism for ensuring that candidate's "preferred" party is, in fact, representative of his or her political beliefs or vice versa. This "disconnect" completely undermines any argument that the stated preference serves any legitimate informational purpose. Again, even if the State has a legitimate interest in providing additional information about candidates to voters, that legitimate interest is far outweighed by the parties' right not to be subject to the "forced association" created by the singular use of a party label at a critical point in the candidate-selection process.

CONCLUSION

In *Jones*, this Court held that a political party has a First Amendment right to control the content of its own message, and nowhere is that right more important than in selecting the candidates who will carry the party's label on the state-printed ballot. Initiative 872 is a bald attempt to subvert that control. Indeed, the express purpose of Initiative 872 is to forcibly alter each party's message to make it more appealing, in its sponsors' eyes, to voters who do not adhere to the party's platform. But, as *Jones* observed, control of this message is essential to a party's ability to function as a meaningful vehicle of political expression for like-minded voters. The Ninth Circuit correctly determined that Initiative 872 stripped political parties of that control and severely burdened their associational rights without any compelling state justification. Accordingly, the California Democratic Party respectfully requests that this Court affirm the Ninth Circuit's decision holding Initiative 872 unconstitutional.

Respectfully submitted,

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Nos. 06-713, 06-730

IN THE

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Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

INTEREST OF *AMICUS*

The Democratic National Committee ("DNC") is an unincorporated association that is the national political organization and governing body of the Democratic Party of the United States. The DNC invests considerable time, resources and effort in communicating to voters what the Party stands for and what it means to be a "Democrat." The DNC has a very significant interest, therefore, in what voters associate with the party label "Democrat" as it appears on the general election ballot next to the names of candidates.

The DNC actively supports Democratic candidates in federal, state and local elections throughout the nation. Re-

spondent Washington State Democratic Central Committee is the officially recognized state party body of the DNC in Washington State. The DNC has long supported the right of the national and state Democratic parties to limit participation in the selection of the parties' standard-bearers to Democratic voters.

The DNC's own rules governing the selection of delegates to its national presidential nominating convention have for more than two decades limited participation in the delegate selection process to Democratic voters only. Delegate Selection Rules for the 2008 Democratic National Convention, Rule 2(A). This Court upheld the DNC's constitutional right to implement that rule in the context of national convention delegate selection in *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981).

It is the position of the DNC that Washington's Initiative 872 unconstitutionally interferes with the ability of the Washington State Democratic Party to determine who will be allowed to participate in the selection of the party's standard-bearers, the individuals whom voters believe represent the party in the general election for various partisan offices. In addition, the Initiative 872 system impairs the functioning of the national Democratic Party by increasing the likelihood that candidates from Washington State running under, and elected under, the "Democratic" label will not represent the values, views and positions of the Democratic Party of the United States.

Pursuant to Sup. Ct. R. 37.3(a), written consent of all the parties to the filing of this brief has been lodged with the Clerk.[1]

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The "top-two" primary system of Initiative 872 affects the associational rights of the parties in exactly the same way as the blanket partisan primary addressed by the Court in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). First, a candidate on the general election ballot with "Democrat" next to his or her name *is* functionally the nominee of the Democratic Party because the party label will influence voters' decision-making in precisely the same way as when the candidate is formally the "nominee." Voters will simply act as if the candidate *is* the party's nominee.

Second, listing the candidate on the general election ballot with a party label has the same "forced association" effect as if the candidate were officially the party's nominee. The DNC not only devotes extensive resources to developing the "brand" of the Democratic Party—ensuring voters know what the party stands for—but takes pains to distance itself from candidates whose views are antithetical to the party's positions and values. Having a candidate not chosen by Democrats appear on the general election ballot as a "Democrat" undercuts the party's associational rights in the same way and to the same extent as if the party were forced to accept the candidate as its official nominee.

Finally, unless a candidate who bears a party label and appears on the general election ballot is treated as the party's nominee, the Initiative 872 system would create substantial uncertainty and confusion in the application of federal campaign finance rules to the parties.

ARGUMENT

I. THE INITIATIVE 872 SYSTEM AFFECTS THE ASSOCIATIONAL RIGHTS OF THE PARTIES IN THE SAME WAY AS A BLANKET PARTISAN PRIMARY

This Court has affirmed that, like all political parties, the "National Democratic Party and its adherents enjoy a constitutionally protected right of political association." *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 121 (1980) (quoting *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975)). The Court has further held that this freedom of association means, among other things, that a political party has a right "to select a 'standard bearer who best represents the party's ideologies and preferences.'" *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989) (quoting *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 601 (D.C. Cir. 1975) (Tamm, J., concurring)). A political party's right to choose its own standard-bearer includes the right to determine who will participate in that process, since limiting that right "limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986).

In *Jones*, the Court held unconstitutional California's "blanket primary" system in which all voters, regardless of party affiliation, were given the opportunity to vote for any candidate regardless of party affiliation, and in which the winning candidate of each party would be advanced to the general election ballot. The Court ruled that by allowing voters of all parties to participate in selecting each party's nominee, the blanket primary violated the parties' freedom of association because it "forces political parties to associate with—to have their nominees, and hence their positions

determined by—those who, at best, have refused to affiliate with the party and, at worst, have expressly affiliated with a rival." *Jones*, 530 U.S. at 577.

In finding the state's asserted interests in promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy to be insufficiently compelling, the Court observed in dicta that these interests could be just as well advanced "by resorting to a *nonpartisan* blanket primary" in which each voter, "regardless of party affiliation, may then vote for any candidate, and the top two vote getters . . . then move on to the general election." *Id.* at 585 (emphasis in original). The Court noted that this "system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee." *Id.* at 585-86.

In arguing that Washington Initiative 872 passes constitutional muster, Petitioners repeatedly insist that the "top-two" primary system of Initiative 872 is a "nonpartisan blanket primary" of the type arguably sanctioned by *Jones* and that in the Initiative 872 system, primary voters are *not* choosing any party's nominee. Brief of Petitioners State of Washington *et al.* ("State Br.") at 14, 37, 41; Brief of Petitioner Washington State Grange ("Grange Br.") at 31-34. Petitioners also point to the implementing regulations promulgated by the Secretary of State, which assert that "[v]oters at the primary election are not choosing a political party's nominees." Wash. Admin. Code 434-262-012 (2005), *cited in* Grange Br. at 32-33.

Simply calling the Initiative 872 top-two primary system "non-partisan," however, does not make it so. "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). The Initiative 872 system affects the associational rights of the parties in the same way as a partisan blanket primary precisely because (i) it advances to the general election ballot

candidates who will be regarded by voters in the same way as official party nominees and (ii) the "forced association" effect is exactly the same as if those candidates *were* the party's nominees.

A. A Candidate On the General Election Ballot With a Party Label Next to Her Name is Functionally the Party's Nominee

The typical general election ballot lists candidates and identifies them by party label. It looks exactly like the general election ballot in the Initiative 872 system. The reality of the Initiative 872 system is that, at the option of any candidate, a party label appears next to that candidate in the primary election (Initiative 872, § 4) and—if that candidate is one of the two top vote-getters in the primary—that candidate appears on the general election ballot *with the same party label next to his or her name*. State Br. at 14, *citing* Initiative 872 § 7(3). Indeed, the Secretary of State's implementing regulations provided that any candidate who indicated party preference in the primary "*may not change* the party preference between the primary election and the general election." Wash. Admin. Code § 434-230-040 (2005) (emphasis added). Thus, if a candidate who runs in the primary as a Democrat is one of the top two vote-getters, and thus advances to the general election ballot, voters in the general election will see this on the ballot: "Jane Smith—Democrat." And, although Petitioners insist that parties remain free to "nominate" candidates through a separate, party-run process prior to the primary, *see* State Br. at 37, Grange Br. at 33-34, the fact that a candidate is the party's official nominee will not be, and cannot be, reflected on either the primary or general election ballot. J.A. 104-11 (Letters from County Auditors to John White); *see* Grange Br. at 23 (State of Washington not required to allow parties to put a statement on the ballot telling voters which person is the nominee).

Given what the voter actually sees when she looks at the ballot, the Initiative 872 system, in reality, functions as a partisan blanket primary and is being used to choose the party's standard-bearer. That is because the only significance of being a party's nominee, *insofar as the content of the ballot is concerned*, is that the candidate is listed on that ballot next to his or her party label.

The Court has recognized that, "[t]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian*, 479 U.S. at 220. In fact, party labels do much more than merely "play a role." The mere inclusion of a party label—the mere visual juxtaposition of the party name and the candidate's name on the ballot—powerfully influences voter behavior. It does so by identifying the candidate, in the voter's mind, with everything that voter associates with the party in terms of platform, message, values and image.

"Voters with little information about individuals seeking office traditionally have relied upon party affiliation as a guide to choosing among candidates. . . . In local elections, a candidate's party affiliation may be the most salient information communicated to voters." *Branti v. Finkel*, 445 U.S. 507, 531 & n. 17 (1980) (Powell, J., dissenting) (citing Richard Murray & Arnold Vedlitz, *Party Voting in Lower-Level Electoral Contests*, 59 SOC. SCI. Q. 752, 756 (1979)). "Empirically, . . . scholars have repeatedly shown that party identification is a, even the, central component of voter decision making." Brian Schaffner, Matthew Streb & Gerald Wright, *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POLITICAL RESEARCH QTLY. 7, 9 (2001).

In *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), the Court of Appeals for the Sixth Circuit struck down a state law

allowing major party candidates to have the party label next to their name but prohibiting nonparty candidates from having the label "Independent" appear next to their names. In finding this ban to be unacceptably burdensome and discriminatory, the Court of Appeals relied on expert testimony that "it does make a difference that some candidates have symbols after their names on the ballot while others do not. Voting studies conducted since 1940 indicated that party identification is the single most important influence on political opinions and voting." 970 F.2d at 172. The Court of Appeals further relied on expert evidence that "party candidates are afforded a 'voting cue' on the ballot in the form of a party label which research indicates is the most significant determinant of voting behavior. Many voters do not know who the candidates are or who they will vote for until they enter the voting booth." *Id.* According to another expert relied upon in the case, a candidate's "use of a name and a label allowed *people to make a connection between the candidate and his platform and to create an identification in the voter's mind.*" *Id.* at 173 (emphasis added).

Despite the decline of straight-ticket voting in recent years, the party label next to the candidate's name is still extremely significant. "[M]any of the voters who are not splitting their tickets may rely upon little more than the "D" or "R" next to a candidate's name, and some of the ticket-splitters probably use the party voting cue for most races about which they have little information." Richard L. Hasen, *Point / Counterpoint: Do the Parties or the People Own the Electoral Process*, 149 U. PA. L. REV. 815, 824 (2001). Recent research confirms that the party label next to the candidate's name still strongly influences voter behavior and that the reason is the identification of the party with the candidate in the voter's mind. One study of the effect of ballot information on voters' decisions in judicial elections, for example, found that, "[s]imply providing respondents with the candidates' party affiliations had an enormous impact on their willingness to

choose a candidate and on the choice of one candidate over another. Not only do a great many voters come to the polls uncertain about what they will do in particular contests, but they are willing to choose a course of action at the last possible moment on the basis of one piece of information." David Klein & Laurence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 POLITICAL RESEARCH QTLY. 709, 725 (2001).

The reason for this is that "[p]arty labels . . . provide important cognitive information. They convey generally accurate policy information about candidates . . . ." Schaffner, Streb & Wright, *supra*, 54 POLITICAL RESEARCH QTLY. at 9. As another study found, the party label influences voter behavior because of the identification, in the voter's mind, of the party label with a whole universe of assumed information about the party, *i.e.*, "partisan stereotypes" which are "rich cognitive categories containing not only policy information but group alliances, trait judgments, specific examples . . . and performance assessments . . . ." Wendy Rahn, *The Role of Partisan Stereotypes in Information Processing About Political Candidates*, 37 AM. J. OF POL. SCI. 472, 474 (1993). As a result, voters "neglect policy information in reaching evaluations; they use the [party] label rather than policy attributes in drawing inferences. . . . Based on this analysis, partisan stereotypes appear to be quite robust cognitive categories with considerable influence . . . ." *Id.* at 492.

Given these realities of voter perception and behavior, the Court of Appeals in this case was clearly correct in finding that, to the extent Initiative 872 "allows candidates to self-identify with a particular party—even if only as a 'preference'—it cloaks them with a powerful voting cue linked to that party." *Washington State Republican Party v. State of Washington*, 460 F.3d 1108, 1119 (9th Cir. 2006). And the voter will use that cue in exactly the same way as if the candidate were the official nominee of the party: the voter

will associate the party's platform, message, values and image with the candidate and respond accordingly.

In these circumstances, it matters little that the state statute purports to treat the party label as merely indicating the candidate's "personal preference." Contrary to the Grange's contention, Grange Br. at 25, it is perfectly reasonable to assume that Washington voters do *not* know the nuanced details of their election statutes. It is unrealistic to attribute to the voter sophisticated knowledge that the state statute deems the party label on the ballot to indicate only "personal preference," rather than indicating nomination by "membership" in or "affiliation" with the political party. State Br. at 23-24. From the perspective of voter perception and behavior, the candidate who appears labeled as a "Democrat" on the ballot will be treated, *by the voter*, as the nominee of the Democratic Party. The State asserts that it is "unlikely that voters will mistakenly consider a candidate's statement of party preference to be a statement that a candidate is the nominee of the party . . . ." State Br. at 24. Exactly the opposite is the case. It is almost a certainty that voters will perceive and act as if the candidate with a party label next to her name *is* the party's nominee.

B. The "Forced Association" Effect Is the Same for a Candidate Appearing on the General Election Ballot With a Party Label as For a Nominee

The State argues that "[b]ecause Initiative 872 does not nominate the candidates of the parties, it does not create a forced association that caused the Court to strike down the blanket primary in *Jones*." State Br. at 43. The "forced association," however results simply and directly from the listing on the *general* election ballot, next to the party label of the name of a candidate who was not selected by members of that party. As discussed in Section I, *supra*, a general election

voter will automatically associate—with any candidate whose name appears on the general election ballot next to the party label—a whole host of information the voter knows (or thinks she knows) about the party. The association is automatic and unavoidable. The Court of Appeals correctly concluded, therefore, that, "[g]iven that the statement of party preference is the sole indication of political affiliation shown on the ballot, that statement creates the impression of associational ties between the candidate and the preferred party, irrespective of any actual connection or the party's desire to distance itself from a particular candidate." *Washington State Republican Party*, 460 F. 3d at 1119.

That "impression of associational ties" burdens the party's associational rights to precisely the same extent, and in the same way, as if that candidate had been selected, through the primary, as the official nominee of the party. The DNC expends great effort and resources to communicate to voters what the Party stands for, by means ranging from distributing door-hangers and cards through volunteer canvassers organized by its State Party Partnership Project staff and the state Democratic parties, to paid advertising, to press releases and statements sent virtually every day to thousands of media outlets and by e-mail to millions of DNC supporters and activists. The "brand" of the Democratic Party—in the sense of what values and positions voters associate with the Party—is of great importance to the DNC and to its state parties. It is detrimental to the Party's ability to organize for the advancement of its beliefs to be associated with candidates who have not been selected by Democratic voters and who do not share the Party's values and positions.

Indeed, the DNC has taken pains to ensure that it is *not* associated with candidates whose views and records are antithetical to the Democratic Party's values, views and positions. The DNC's rules for selection of delegates to the National Convention provide that, "[b]ased on the right of the

Democratic Party to freely assemble and to determine the criteria for its candidates, it is determined that all candidates for the Democratic nomination for President or Vice President shall . . . have demonstrated a commitment to the goals and objectives of the Democratic Party as determined by the National Chair . . . ." 2008 Delegate Selection Rules, Rule 12(K). A similar rule has been in effect since 1996.

In connection with the presidential nominating process that year, the DNC National Chair sent state parties a letter indicating that Lyndon LaRouche, who was then seeking the Democratic nomination for President, was, by virtue of his expressed racist and anti-Semitic views, not a bona fide Democrat under this rule; would not be eligible to have his name placed in nomination at the Convention; and would not be awarded any delegates. In a challenge brought by LaRouche asserting, among other things, that the DNC's actions violated his civil rights, the Court of Appeals emphasized that the DNC had its own constitutionally-protected right to decide with what candidates it wishes to be associated, finding that this Court's "cases have made clear that the very actions at issue here—the Party's decision about who can be nominated as delegates and even *about who can be considered a Democrat*—are themselves clothed in First Amendment protection." *LaRouche v. Fowler*, 152 F.3d 974, 992 (D.C. Cir. 1998) (emphasis added). The Court asked and answered the key question: "May a court require a political party . . . to show a compelling justification before it may limit a putative candidate's ability to associate itself with the party? . . . We already know the Supreme Court's likely answer to this question . . . ." *Id.* at 994.

To have a candidate's name appear on the general election ballot next to the label "Democrat" clearly associates that candidate in the minds of the voters in exactly the same way and to the same extent as if the candidate were the official nominee. As a practical matter, the imprimatur is the

same. And the association takes place even though the Party may not wish to be associated in any way with the candidate, and even though Democratic voters did not choose that candidate as their standard-bearer. The Court of Appeals, therefore, was correct in concluding that under Initiative 872, the "ballot communicates a political association that may be unreciprocated and misleading to the voters, to the detriment of the political parties and their bona fide members." *Washington State Republican Party*, 460 F.3d at 1121. In that regard, Initiative 872 has exactly the same "forced association" effect as if the primary did serve to select the official nominees of the Party.

II. INITIATIVE 872'S CREATION OF A CATEGORY OF UNOFFICIAL NOMINEES IS A RECIPE FOR CONFUSION AND UNCERTAINTY IN THE APPLICATION OF FEDERAL CAMPAIGN FINANCE RULES APPLICABLE TO PARTIES

There are a variety of ways in which candidates become the nominees of political parties for particular offices under the various state laws. Parties may also have officially endorsed nominees in true non-partisan primaries, as the Court recognized in *Jones*. 530 U.S. at 585. Alone among the states, however, Washington has created a unique category of federal candidates whose names appear on the general election ballot under the party label but who are nonetheless deemed *not* to be the party's nominees, under state law. This system creates the potential for significant confusion in the administration of federal campaign finance laws applicable to political party committees.

First, under the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431 *et seq.* ("FECA"), a "political party" is defined as an "association, committee, or organization which nominates a candidate for Federal office *whose*

name appears on the election ballot as the candidate of such association, committee or organization." 2 U.S.C. §431(16) (2007) (emphasis added). In addition, the Act defines "national committee" as the "organization which, by virtue of the bylaws of a political party, is responsible for the day to day operation of such political party at the national level, as determined by the [Federal Election] Commission." 2 U.S.C. § 431(14) (2007). Under FECA, the consequences of being recognized as a national party committee are significant; among other things, a national political party can make expenditures in coordination with candidates for federal office far in excess of what any other political committee can contribute, monetarily or in-kind. 2 U.S.C. §441a(d); *see generally, Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604, 610-13 (1996) ("*Colorado Republican I*") (explaining special coordinated expenditure authority of recognized political parties).

In determining whether a party organization is the "national committee" of a political party, the Federal Election Commission (FEC) looks to determine whether the party has achieved ballot access for its candidates for federal office and specifically, whether it has achieved the "*nomination* of candidates for various Federal offices in numerous states," including offices beyond President and Vice President. FEC Advisory Opinion 1995-16 (July 14, 1995) (emphasis added) (finding that U.S. Taxpayers Party qualifies as national committee of a political party). *Accord*, FEC Advisory Opinion 1998-02 (March 6, 1998) (finding Reform Party USA to be national committee); FEC Advisory Opinion 2001-13 (Nov. 8, 2001) (finding Green Party USA to be national committee). Under Initiative 872, it will be impossible to determine whether a candidate who was not endorsed by a party but whose name appears on the general election ballot under the party label should be considered the "nominee" of the party, or not, for purposes of determining national committee status. If the answer is no, and if numerous other

states adopted a similar system, few new parties could ever qualify as national committees if their officially endorsed candidates—who cannot be identified as such on the primary ballot—were not advanced to the general election, even if another candidate running under the party label *did* appear on the general election ballot.

Second, under the coordinated expenditure provision itself, a national and state party may make expenditures, up to specified limits, "in connection with the general election campaign of a candidate for Federal office in a State who is *affiliated* with such party." 2 U.S.C. §441a(d)(3) (emphasis added). As explained by the Court in *Colorado Republican I*, the coordinated expenditure provision "creates a general exception from [the] contribution limitation" normally applicable to political committees—$5,000 per election to a federal candidate, 2 U.S.C. §441a(a)—and substitutes a much higher limit. 518 U.S. at 611. In 2006, for example, that limit was $39,600 for each of the national parties and the state parties, for expenditures made on behalf of a U.S. House candidate. FEC Record, March 2006 at 5. Under Initiative 872, a candidate who appears on the general election ballot next to a party label is specifically deemed to have indicated a preference, but not to be "affiliated" with the party. "Washington's law allows candidates to express their 'preferences' but takes no note of any candidate's 'party membership' or 'party affiliation.'" State Br. at 23. If a candidate advances to the general election ballot and her name appears next to the party label, is that candidate considered to be "affiliated" with the party? If so, the national and state party may make coordinated expenditures on behalf of the candidate. If not, they cannot. Initiative 872 thus leaves, in a completely confused and uncertain state, a national party's critically important legal authority to make coordinated expenditures on behalf of its federal candidates.

Third, FECA provides that state parties may spend their funds on certain defined volunteer, grassroots activities without having that spending count against either the contribution or coordinated expenditure limits. 2 U.S.C. §§431(9)(B)(iv), (viii) & (ix). Two of these exemptions are available for specified activities "on behalf of *nominees* of such party." 2 U.S.C. §§431(9)(B)(viii); 431(9)(B)(ix)(emphasis added). If under Initiative 872 a party does not separately endorse a candidate, but a candidate advances to the general election ballot under the party label, does the party have a "nominee" for purposes of this provision? Again, Initiative 872 would create significant confusion and uncertainty and though the FEC has authority to interpret and administer these provisions, there is no logical or obvious answer in such a system.

For these reasons, if the candidate appearing on the general election ballot with a party label under Initiative 872 is *not* deemed to be the party's nominee, the Initiative will create confusion in the implementation of federal campaign finance rules applicable to the party committees.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Nos. 06-713, 06-730

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In The Supreme Court of the United States

WASHINGTON STATE GRANGE,

Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY; DIANE TEBELIOUS; BERTABELLE HUBKA; STEVE NEIGHBORS; MIKE GASTON; MARCY COLLINS; MICHAEL YOUNG; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDY; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; and J.S. MILLS

STATE OF WASHINGTON; ROB McKENNA, Attorney General; and SAM REED, Secretary of State,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; DIANE TEBELIOUS; BERTABELLE HUBKA; STEVE NEIGHBORS; MIKE GASTON; MARCY COLLINS; MICHAEL YOUNG; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDY; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; and J.S. MILLS

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATE OF LOUISIANA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Is the Louisiana "Open Primary" system significantly different from Initiative 872 passed by the State of Washington such that it can avoid any negative effect from the ruling of the Court on the instant issue?

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INTEREST IN AMICI CURIAE

In view of the fact that the State of Washington has passed an open primary election system similar to the Louisiana system, the State of Louisiana believes it has an interest in this ruling by the Supreme Court. Louisiana's open primary system has been referenced by the Ninth Circuit in its opinion declaring the state of Washington's open primary system unconstitutional. The Amicus brief will highlight the fact that Louisiana's primary election system differs from the one passed by Washington, and therefore, should not be affected by the outcome of the instant matter.

SUMMARY OF ARGUMENT

In November 2004, the voters in the state of Washington overwhelmingly passed a new open primary election system. This system allows all candidates, regardless of political party affiliation, to have their names placed on the primary ballot for a particular elective office. The voters, regardless of political affiliation, are able to cast a vote for any of the candidates in that race. The top-two finishers, regardless of percentage of votes obtained, advance to a general election. This system has been found to be unconstitutional by both the United States District Court and the United States Court of Appeals for the Ninth Circuit. The Supreme Court of the United States granted the writ application filed by the state of Washington.

While Louisiana's Open Primary was referenced during the course of this litigation as similar to the Washington Primary System, it is distinguishable from Washington's and should not be affected by any ruling by the Supreme Court in this matter.

ARGUMENT

In January 2004, the Washington State Grange (hereinafter referred to as "Grange")[1] filed Initiative 872 (hereinafter referred to as "I-872") with the Washington Secretary of State. The initiative made several changes to the primary election system but it retained the partisan nature of the primary. The language of the initiative stated that it "concerns elections for partisan offices" and "would change the system used for conducting primaries and general elections for partisan offices." I-872 was to be placed on the November 2004 general election ballot to be voted on by the people.

Significant of note, I-872 would retain a general election for the top two finishers regardless of the percentage of votes a candidate received. The Louisiana system, on the other hand, provides for a winner to be declared in the "primary" should one candidate receive 50.1% of the vote, thereby negating the need for a general election.

In March 2004, the Washington legislature adopted two alternative primary systems, subject to the outcome of the vote on I-872 in the November 2004 general election. As its first choice, the legislature adopted a "top two" primary system similar, though not identical, to the one the Grange proposed in I-872. The United States Court of Appeals for the Ninth Circuit noted in its ruling that this "top-two" primary is also sometimes referred to as the

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[1] The Washington State Grange is a subsidiary of the National Grange, which is described by its Washington chapter as "America's oldest farm-based fraternal organization" and as "a non-partisan, grassroots advocacy group for rural citizens with both legislative programs and community activities."

"Cajun" or "Louisiana" primary, after the only other state that employs a similar sort of primary.

Washington Governor Locke vetoed the "top two" primary system in April 2004, so the legislature instead, enacted the so-called "Montana" primary, which is similar to an open-primary. This system, according to the Ninth Circuit, allows a voter to vote for a party's nominee but the voter's choice is limited to that party's nominee for all offices. If the voter chooses the Democratic nominee for governor, then he must choose the Democratic nominee for all offices on that ballot.

Despite the actions of the legislature, the voters of the State of Washington overwhelmingly passed Initiative 872 in November 2004, which was to become the new state's partisan primary election system. This new system allows all voters to vote for any candidate, and the top two candidates advance to the general election regardless of party affiliation.

The Washington State Republican Party and the Washington State Democratic Central Committee moved for a preliminary injunction to prevent the state from implementing I-872 just five months after it went into effect. The district court found that the implementation of I-872 would unconstitutionally impair the freedom of speech and associational rights of the plaintiffs.

The court reasoned that allowing a candidate to publicly state a party preference in a primary election creates a constitutionally significant "association" between the candidate and the party, an "association" which states may not foster without political party consent.

The State and the Grange appealed the ruling to the Ninth Circuit.

The Ninth Circuit affirmed the trial court by holding that the initiative redefined the concept of "partisan office," but those offices remain partisan and so does the primary. By including candidates' self-identified political party preferences on the primary ballot, Washington permits all votes to elect individuals who may effectively become the parties standard bearers in the general election.

In 1976, the Louisiana Legislature completely rewrote the state's election code. That revision abolished the state's dual primary system in favor of an open primary system where all qualified candidates regardless of party affiliation appear on the same ballot, and all voters, regardless of party affiliation, are entitled to vote.

In *California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402 (U.S. 2000), Justice Stevens, in his dissent, noted that the Louisiana primary system "is not actually a 'primary' in the common, partisan sense of that term at all. Rather, it is a general election with a runoff . . . "

Louisiana's "primary" system for state elections is therefore distinguishable from the Washington "primary" system and should not be impacted by a ruling from the Supreme Court on the instant matter.

In *Love v. Foster*, 147 F. 3d 383 (5th Cir. 1998), the petitioners alleged that Louisiana's open primary system authorized a contested election for members of Congress to be decided before the uniform federal election day in November, thereby violating Federal law.

The trial court granted summary judgment to the defendants and the plaintiffs appealed to the United

States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed the trial court, holding that the Louisiana primary schedule violated federal law by deciding on members of Congress before the uniform federal election day.[2]

The Supreme Court grated *certiorari* and held that "when Louisiana's statute is applied to select from congressional candidates in October, it conflicts with federal law *and to that extent* is void."[3] The case was remanded with directions to reconsider the plaintiffs' request for injunctive relief if the Louisiana legislature did not timely resolve the violation caused by the October primary election of federal candidates.

When the legislature failed to take corrective action, the trial court ordered that future elections for members of Congress shall be held on the federal election day and any necessary run-off would be held on the next available election day contained in the Election Code.

The plaintiffs appealed the order contending that the trial court erred when it failed to reinstate the prior closed primary system in effect before the Election Code revisions in 1975. They allege that by striking down the provisions for an October election for congressional offices, the Supreme Court vitiated the entire election code, thereby revising the previous election system.

The Fifth Circuit began its opinion by emphatically stating, 147 F. 3d at 383, that,

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[2] *Love v. Foster*, 90 F. 3d 1026, 1031 (5th Cir. 1996), *affirmed*, *Foster v. Love*, 522 U.S. 67, 118 S. Ct. 464, 139 L.Ed.2d 369 (1997).

[3] *Id.* 522 U.S. at ___, 118 S.Ct. at 468, 139 L.Ed.2d at 376.

> There has been no relevant finding that the remainder of Louisiana's election code is in conflict with the Constitution or with any federal statute. In our earlier rejection of the invitation to declare the current election system invalid, and to replace it with the previous scheme, we stated that such a "drastic remedy would require us to radically overhaul the state's election procedure and reinstate an election system which the state abolished eighteen years ago." We were not then prepared to take that Gargantuan step, nor, apparently, was the Supreme Court. We are not now prepared to do so unless mandated by dispositive law.

The Court noted that the critical question at hand was whether the invalidity of the provisions for the October primary to elect members of Congress doomed the entirety of the Louisiana election code. The Court had to decide if that section was severable from the legislation.

It was determined by the Court that the Legislature would have adopted that Election Code without the invalid provisions, so the Court then focused on whether the remainder of the Election Code was capable of enforcement without the provision. Citing *Dow Hydrocarbons & Resources v. Kennedy*, 694 So. 2d 215, 218 n. 7 (La. 1997), the Court held that "it is not within the authority of the judiciary to rewrite the legislation in order to salvage the remainder." For the legislation to survive, the valid portions of the election code must form a complete act within itself.[4]

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[4] *Pershall v. State*, 697 So. 2d 240 (La. 1997); *State v. Johnson*, 343 So. 2d 705 (La. 1977).

The Fifth Circuit held, 147 F. 3d at 386, that:

> The Louisiana election code systematically is complete. It provides for an open primary for election of state and federal office holders. It establishes detailed procedures for implementing elections and regulating the voting process. It provides an encompassing body of law governing the conduct of local, state and federal elections. Examining the Louisiana election code without the October, formerly September, first primary date, we find adequate and sufficient election series to accomplish the true purpose of the election code – the proper and appropriate election of the candidates favored by the majority of the voting electorate.

The Court concluded by ruling that the invalidated October first primary date is severable, and that the election statutes, after the severing of the October primary election, remain complete, sufficient, enforceable, and stand on their own.

The Louisiana Legislature did enact legislation to resolve the conflict articulated in *Love* when it passed Act 560 in the 2006 Regular Session. This legislation established closed primaries for federal elections and provided for appropriate election dates to fall on the uniform federal election day commencing with the federal elections in 2008.

CONCLUSION

For the foregoing outlined reasons, the current Louisiana primary election system should be viewed as unique from the system implemented by the State of Washington and any ruling regarding the instant matter should not have any effect on the Louisiana primary system.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

- x

WASHINGTON STATE GRANGE, :

Petitioner :

v. : No. 06-713

WASHINGTON STATE :

REPUBLICAN PARTY, ET AL.; :

and :

WASHINGTON, ET AL., :

Petitioners :

v. : No. 06-730

WASHINGTON STATE :

REPUBLICAN PARTY, ET AL. :

- x

Washington, D.C.

Monday, October 1, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

ROBERT M. McKENNA ESQ., Attorney General, Olympia, Wash.; on behalf of Petitioners.

JOHN J. WHITE, JR., ESQ., Kirkland, Wash.; on behalf of Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in case 06-713, Washington State Grange v. Washington State Republican Party et al., consolidated with 06-730, Washington v. Washington State Republican Party et al.

General McKenna.

ORAL ARGUMENT OF ROBERT M. McKENNA

ON BEHALF OF THE PETITIONERS

MR. McKENNA: Mr. Chief Justice, and may it please the Court:

In adopting Initiative 872, Washington's voters followed this Court's guidance in California Democratic Party v. Jones. They adopted a top-two election system. By so doing the voters eliminated the crucial constitutional defect of a partisan blanket primary because in the top-two system the voters are no longer selecting the party's nominees for the November election. The Ninth Circuit nonetheless ruled that Initiative 872 is unconstitutional, holding that allowing each candidate to state his or her personal party preference on the ballot would create the appearance of association between a political party and candidate.

The Ninth Circuit is wrong for at least two reasons. First, the Ninth Circuit's appearance-of-association conclusion assumes that top-two ballots will look the same as ballots under a party nominating election system. They will not. The top-two ballot --

CHIEF JUSTICE ROBERTS: Can you give us assurance that they will not? I take it we don't -- we haven't had an election under this system, so we don't know what the ballots are going to look like.

MR. McKENNA: Yes, Your Honor. That's correct. We have not had an election, and the secretary of state was enjoined by the district court before having the opportunity to promulgate the regulations governing the ballot after 872's adoption.

However, Your Honor, we may look to the declaration of candidacy form, which the secretary of state did have the opportunity to promulgate, which appears in the corrected joint appendix at pages 592-593. And what we see there, Your Honor, Mr. Chief Justice, is that, unlike the old declaration of candidacy form, we have the candidates declaring themselves as a candidate for the office of blank, and instead of saying that they're a candidate of a party, they say -- that you have an opportunity to check off the box that my party preference is blank or I'm -- I am

an independent candidate; or, under Initiative 872, if they check neither box, that will be left blank on the ballot.

JUSTICE ALITO: But you say that the purpose of allowing a candidate to declare a preference is simply to convey useful information to voters, but once you decided, once the State decided, that the ballot was not going to indicate party affiliation, why do you limit candidates to the names of parties? Why don't you allow them to pick some other phrase that better expresses their point of view? Somebody may want to say, I'm the pro-environment candidate, or I'm the no-new-taxes candidate. Why do you limit them to saying Democrat, Republican, Libertarian, et cetera?

MR. McKENNA: Your Honor, the voters could have chosen to allow candidates to include other information. In fact, in the State's earliest days candidates were given five words they could use for whatever expression they wished. But the voters chose to allow an expression of party preference, which the State is allowed to do. The State is not required to allow the ballot to be a form -- forum for political expression, but the State is allowed to do so and has chosen to do in this way.

JUSTICE ALITO: What is that and wasn't the

purpose that was offered by the proponent of the initiative to try to get around the decision in Jones, to change the system as little as possible?

MR. McKENNA: No, Your Honor, because there is an immense difference between the top-two system and the system that replaces the old blanket nominating primary. The immense difference is of course that the first stage of this two-stage general election process is no longer being used to select the nominees of the parties, which was identified as the one characteristic in Jones --

JUSTICE STEVENS: Justice Alito can defend his own question, but he asked whether or not the Grange stated that this was the purpose.

MR. McKENNA: Well, the Grange was --

JUSTICE STEVENS: And then you -- you didn't quite answer that question. You said, oh no, and you gave an explanation. But just as a matter of the historical record --

MR. McKENNA: Yes.

JUSTICE STEVENS: -- Justice Alito's question was accurate with respect to the proponent's position, was it not?

MR. McKENNA: Yes, Your Honor, but the Grange also said in the voters' pamphlet statement,

quote, "This system has all the characteristics of a partisan blanket primary save the constitutionally crucial one: Primary voters are not choosing a primary's nominee." That's Joint Appendix 79.

So, yes, they were campaigning for it, but I believe that the relevant State purpose or regulatory interest in allowing an expression of party preference is the same as we see referenced in Tashjian and in Anderson v. Celebrezze.

JUSTICE KENNEDY: Well, if it's your position that the parties are not really injured or affected by this, and the parties' position is that they are, who should we believe? I mean, it's hard for you to tell the parties that they don't know what's in their best interest.

MR. McKENNA: Your Honor, this is a facial challenge. All the major cases underlying this one were as-applied challenges. The parties were able to bring in, in all those cases, evidence. There is no evidence in the record that the parties will be harmed by the expression of party preference.

JUSTICE SCALIA: We know what -- what it's going to be like. We don't know the exact phrasing on the ballot, but we do know that a candidate is allowed to associate himself with a party, but a party is not

allowed to disociate itself from the candidate.

I am less concerned about the fact that the candidate can't say I'm the -- I'm the no-taxes candidate, than I am about the fact that he can associate himself with the Republican Party or the Democratic Party on the ballot and that party has no opportunity on the ballot to say, we have nothing to do with this person. That it seems to me is a great disadvantage to the parties.

MR. McKENNA: Justice Scalia, there may be an association in the dictionary sense, in the same way that a candidate who expressed a preference for one public policy versus another may be associated. But in the constitutional sense, this Court has found that there is a forced association only when the objecting party is compelled to speak it or when the objecting party is --

JUSTICE SCALIA: I'm not talking about a First Amendment forced association. I'm talking about an association for purposes of making this a fair election at which the parties have an opportunity to nominate and support their own candidates. And what this system creates is a ballot in which an individual can associate himself with the Republican Party, but on the ballot the Republican Party is unable to dissociate

itself from that candidate.

MR. McKENNA: Your Honor, I would refer the Justices to pages 2 and 3 of the Grange yellow brief where two sample ballots are laid out that incorporate the language from the declaration of candidacy regulations.

CHIEF JUSTICE ROBERTS: Are you telling us that that's what the ballots are going to look like?

MR. McKENNA: Yes, Your Honor. I believe this is what the ballots will look like. And -- and until the --

JUSTICE GINSBURG: You have two choices and I think there's another one on page 12, is there not? So are you representing, General McKenna, that one of these will be what the State of Washington ballot will look like?

MR. McKENNA: Justice Ginsburg, these are two examples of what the ballot is likely to look like, although it's frankly also likely to have even more information stating the difference between expressing a preference and expressing a formal association.

JUSTICE SCALIA: Will, will it say whether the party that is preferred likes this candidate?

MR. McKENNA: It will say, Your Honor, if you would look to the sample --

JUSTICE SCALIA: I think you can say yes or no to that. Will it say whether the party for which he expresses a preference claims or disclaims him?

MR. McKENNA: It will stay that it is not a statement by the political party identifying that candidate.

JUSTICE SCALIA: Please answer yes or no. Will it say whether the party for which he has expressed a preference claims or disavows him?

MR. McKENNA: It will not, Your Honor.

JUSTICE SCALIA: All right.

JUSTICE SOUTER: General, as I understand it the parties are now free to come up with any scheme they want to for selecting an official candidate.

MR. McKENNA: Yes, Your Honor.

JUSTICE SOUTER: Let's assume the Democratic Party decides to have a State convention. If the law in Washington provided that the nominee selected by that convention could state on the ballot not merely a preference for Democrats, but a statement that, I am the nominee of the Democratic Party, your position in this case I take it would be exactly the same.

MR. McKENNA: Yes, Your Honor, it would.

JUSTICE SOUTER: Okay.

JUSTICE STEVENS: Let me ask this question.

Is there anything in the State law that would prevent you from requiring a candidate to be a member of the party whose preference he states?

MR. McKENNA: There would not be, Justice Stevens, no.

JUSTICE STEVENS: And under the -- under the court's, holding it would be equally unconstitutional if he did that, I suppose.

MR. McKENNA: Your Honor, it would be equally constitutional if we prevented someone, yes, sir, from expressing a party preference or affiliation.

JUSTICE STEVENS: Indeed, there's -- I'm sorry. Go ahead.

JUSTICE ALITO: Will the ballots necessarily be the same in every county?

MR. McKENNA: Yes, Your Honor, because they will be promulgated under regulations established by the State secretary of state.

JUSTICE ALITO: Some of the counties have paper ballots, some of the counties have -- is that correct?

MR. McKENNA: Yes, Your Honor. But in Washington State nearly all voters vote by mail now. So they -- over 90 percent of voters and eventually nearly 100 percent of voters will be voting by mail and will

receive the same ballot form, with the same ballot instructions and explanations as in the samples that I've showed you.

JUSTICE SCALIA: Is -- Iis there any, what should I say, truth investigation by the State of Washington? Suppose a candidate who has been a Democrat all his life, has run for office as a Democrat, agrees with all the positions of the Democratic Party, chooses to state on the ballot: I prefer the Republican Party. That's okay?

MR. McKENNA: Yes, Your Honor. I would refer you, Justice Scalia to JA-415. Section 9.5(5) of Initiative 872 requires the candidate to sign a notarized declaration, quote, "stating that the information provided on the form is true." So they are signing declarations -- a declaration which is notarized saying that everything that they have put on the form is true.

JUSTICE SCALIA: I guess -- how can you say it's false?

MR. McKENNA: That's correct, Your Honor.

JUSTICE SCALIA: If he thinks he prefers it, I guess he prefers it, even though it's contrary to his entire life.

MR. McKENNA: Yes, Justice Scalia, it is

expression of preference. It is a subjective expression. It would be difficult to disprove. However, if a candidate were to -- let's say the chairman of the State Republican Party filed a declaration of candidacy and said, I prefer the Democratic Party. The Democratic Party would have many opportunities to object. And you know, the ballot is not even the most important source of information that voters have, as this Court has recognized in Tashjian and Celebrezze. So there would be many opportunities.

If there is a concern about false statements, Your Honor, it seems to me the correct approach is to provide for more speech, not to limit the speech of all the candidates by refusing to permit them to express their preferences.

JUSTICE STEVENS: Is there any evidence, any historical evidence, that any candidate has ever done what Justice Scalia suggests?

MR. McKENNA: No, Your Honor. I'm not aware of any specific instance.

CHIEF JUSTICE ROBERTS: There just hasn't been an election under this, under this law, right?

MR. McKENNA: Correct Mr. Chief Justice. We have not had a chance to even hold an election.

JUSTICE KENNEDY: Well, there is evidence

that, in other States, those who preached racial hatred have tried to associate themselves with a particular party, much to the concern of that party, and I see nothing in your position that would prevent that.

MR. McKENNA: Justice Kennedy, the candidates will be expressing a preference, this is true if they wish to. But there will be many -- first of all, that is not compelled speech by the party; and secondly, it is not compelling the party to accept that person as a member, as a member. As the emergency rules for the declaration and as a sample ballot show, we'll be very explicit in explaining to the voters that someone claiming a preference, it's not a statement by the party that they're claiming the person as a member or a formal association.

JUSTICE KENNEDY: And is the remedy for the party, you said, to have more speech for the party, to say that this is not their candidate, etcetera?

MR. McKENNA: Yes, Your Honor, that is exactly what --

JUSTICE KENNEDY: But this Court has said that parties could be strictly limited in the amount of moneys they spend to endorse a particular candidate.

MR. McKENNA: But there will be many opportunities --

JUSTICE KENNEDY: I don't think the law can have it both ways.

MR. McKENNA: Your Honor, if I can use an example that might help illustrate our point. Imagine that Mr. Dale from the Boy Scouts v. Dale case moved to Washington State and wanted to run for office, and imagine that, instead of saying party preference, the voters had said, well, you can choose to list any organization for which you have a preference, a political organization or another; and that Mr. Dale decided to express a preference for the Boy Scouts. Mr. Dale would be exercising his own speech, but that would not be the same thing as compelling speech by the Boy Scouts. Nor would he be compelling --

CHIEF JUSTICE ROBERTS: Nobody is voting for Mr. Dale perhaps on the misimpression that he is affiliated with the Boy Scouts, and that's what undermines the Boy Scouts' associational rights. People are going to think he's associated with the Boy Scouts even though they may want to disassociate themselves with him.

MR. McKENNA: Allowing -- Mr. Chief Justice, allowing Mr. Dale to say he has a preference for the Boy Scouts I don't think can reasonably be confused with him claiming that he is a member, particularly when as

applied --

CHIEF JUSTICE ROBERTS: Do you agree that if it were that way, in other words if the ballot looked like the ballot on page 1 of the Grange reply brief, that that would be unconstitutional?

MR. McKENNA: Yes, Your Honor, it would be harder to argue from our side. But Your Honor, the Ninth Circuit only assumed that the ballot would look like the ballot on page 1 of the Grange yellow brief. They assumed that the ballot would look exactly like the ballot in a nominating primary, and our point here is that it will not.

CHIEF JUSTICE ROBERTS: Do these preference statements continue under the general election?

MR. McKENNA: Yes, Your Honor, they do.

CHIEF JUSTICE ROBERTS: Can you change between the primary and the general election? Can you say my preferred party is the Republican Party, so you get more Republican votes to get you over the hump so you are one of the two, and then in the general election say, my preference is the Democratic Party, because there are more Democratic voters?

MR. McKENNA: No, Mr. Chief Justice. State law would not permit that.

JUSTICE ALITO: Well, why can't you do that,

if the purpose is to provide accurate information about a candidate's position. Suppose the candidate prefers one party at the time of the primary and then something happens. The issues change. The person -- the candidate says: Well, now my preference is really for the other party. I was close before and I've swung over to the other side. If that's accurate information about where the candidate stands at the time of the general election, why can't that be put on the ballot, unless you're trying to indicate affiliation rather than really preference?

MR. McKENNA: Justice Alito, the State could have chosen to allow people to change their preference expression. But the State did not and the State is not required to do so.

CHIEF JUSTICE ROBERTS: You're saying -- your argument is that they have a First Amendment right to put their preference on the ballot, but somehow when the general election comes along that First Amendment right evaporates.

MR. McKENNA: There is also -- Mr. Chief Justice, there is also an important practical consideration here. And the Court has recognized the State has regulatory practical interests --

JUSTICE GINSBURG: General McKenna, may I

ask you at that point --

MR. McKENNA: Yes.

JUSTICE GINSBURG: -- if that's a correct statement of your position.

I didn't understand you to take the position that a candidate has a constitutional right to state on the ballot. The State of Washington has chosen to give the candidate that option, but is -- I have not read anything in your brief that suggests that a candidate has a right to do so.

MR. McKENNA: You're correct, Justice Ginsburg. I did not mean to suggest that candidates have a constitutional right to have any information on the ballot like an expression of party preference. And I was about to say, there is a very important practical reason to require candidates to decide what their preference will be listed as and to keep it the same. The reason is that we have to have time to print the ballots and produce the ballots in time to send out 3 weeks before the election, when over 90 percent of voters begin voting by mail.

JUSTICE GINSBURG: But you did say that it is unlikely voters will be mistaken, that they will mistakenly consider a statement of party preference to be the equivalent of a party endorsement. You did say

that, and on what basis are you predicting that the statement of preference will not be confused with a statement of endorsement?

MR. McKENNA: On two bases, Justice Ginsburg. The first basis is that, as we've shown with the sample ballots from the Grange brief, the State will be extremely explicit in stating that the candidate's claim of preference or statement of preference is not the party's statement that the candidate is a member, endorsee, nominee, or what have you.

The second basis is I think just the general basis this Court has recognized in Tasjian and in Anderson v. Cellebreze, where the Court expressed a greater faith in the ability of individual voters to inform themselves beyond just the balance. There are so many other sources of information.

JUSTICE SCALIA: I don't think it's enough that -- that there's no claim of party endorsement. There is a claim of associating himself with the party, and if he associates himself with the party it seems to me the party should be able to disassociate itself from him. And I think it harms the party not to permit that.

MR. McKENNA: No, Justice Scalia, I respectfully disagree. This is not an association in the constitutional sense. It is merely an expression of

preference, which we -- which Initiative 872 in its open language and which the ballot will carefully distinguish from claiming a formal association.

JUSTICE SOUTER: Do you know any Democrats who go around saying I prefer the Democratic Party who do not regard themselves and register themselves as Democrats? I mean, in the real world I don't know that -- I don't know whether this is fatal to your case, but in the real world, it seems to me the distinction you're drawing is simply not drawn.

MR. McKENNA: Your Honor, I think it's helpful to think of the expression of party preference as a subset of party affiliation. In other words, someone might be a party affiliate --

JUSTICE SOUTER: It's helpful to your case, but, going back to my question, do you know any people who go around saying, well, you know, I really prefer the Democrats; I'm a Republican myself? I mean that, that doesn't happen.

MR. McKENNA: Well, the example of Senator Lieberman comes to mind, where he said I really prefer the Democrats and I'm running as an independent.

(Laughter.)

JUSTICE SOUTER: There's always one.

But seriously, as a systemic matter, do you

really think that's -- that's a distinction that anyone would recognize?

MR. McKENNA: I think that we are permitted to allow people to express their preference. Many of these people who do so would be independents, I think.

JUSTICE SOUTER: No, but that isn't responsive to my question. Do you really think that that distinction is a distinction which is accepted as a working way of thinking in this world?

MR. McKENNA: Yes. Yes, I do, Justice Souter.

JUSTICE SOUTER: You really do?

MR. McKENNA: In Washington State over 40 percent of the voters, for example, identify themselves by -- as independents. Keeping in mind we have no party registration in Washington State, over 40 percent of voters when asked say I'm an independent; I may -- and that does not mean they may not prefer one party over the other, they may not generally vote for one party or the other, but they think of themselves as independent.

JUSTICE SOUTER: But it means that they -- they will prefer the candidate of one party or another, assuming they vote and there's no independent candidate running. But it seems to me that the very declaration, the very assumption of status as an independent says, I

don't as a systemic matter prefer one party to the other; a pox on both their houses.

MR. McKENNA: Justice Souter, it may also mean that I choose not to formally affiliate with the party, even though I prefer that party's policies, goals. You look at the independent --

JUSTICE SOUTER: It could. But do you really think, again, in the real world, that that's why people register themselves as independents?

MR. McKENNA: We have no registration in Washington State, Justice Souter.

JUSTICE SOUTER: Well, however the statement is made.

MR. McKENNA: There have been a number of cases where individuals have run -- have run for office as independents and then have chosen to, you know, attend the caucus meetings of the Democratic Party, for example. So, yes, it does happen. And the point is that people are allowed to do this, but they're not required to.

JUSTICE SCALIA: General McKenna, I'm interested in how this new system meshes with the otherwise quite partisan nature of Washington's election laws. For example, the major political parties have a certain -- certain benefits that are not given to minor

parties, and the major parties are determined on the basis of obtaining more than a certain percentage, I think it's 5 percent, in a statewide election. How are you going to figure out whether the Republican Party has, has gotten more than 5 percent when all you have is somebody who expresses a preference for the Republican Party, although he's not really a Republican?

MR. McKENNA: Your Honor, as legal counsel for the State we've analyzed that question, and have concluded that unless and until the legislature chooses to alter the statute to harmonize at a practical level, the way that we will apply that statute is to count the votes of the party cast for the party's official nominee. The person who has been identified the party through their separate nominating process, for example, through a convention, that person will be identified. And they will campaign as "the nominee." They will explain that to the voters in every way possible, and we will count the votes cast for that person in calculating whether the 5 percent threshold has been met.

JUSTICE KENNEDY: I was going to ask the counsel for the Respondents, and you can answer as well, can you explain to me briefly the existing structure for the Republican Party, the Democratic Party, to say Mr. Smith is our nominee?

MR. McKENNA: Well, the Initiative 872, Justice Kennedy, repealed the old State law which required the parties to use the State primary to select their nominees. And Initiative 872, in fact, is silent on the procedures the parties will follow. So they are left as they were back in the early days of statehood to decide for themselves how to designate their nominees.

JUSTICE SCALIA: And they have not devised a structure that we know of?

MR. McKENNA: No. Actually, Your Honor, they have. In fact, the Republican Party after Initiative 872 was adopted and before it was enjoined adopted rules and procedures for holding nominating conventions.

And they also, for example, adopted a rule, which is Rule 5, that they said that if an incumbent runs and receives 66 percent of the support at the nominating convention, no other Republican can go onto the ballot. This is their claim. No other Republican can go onto the first stage ballot and claim to be a Republican. That is their assertion. Only that one person can go on with the "R" after his name -- an idea that we basically reject if it means that no one else can even express a preference for the Republican Party.

But we agree that only one candidate will be

allowed to truthfully claim that he or she is the nominee of the party if the party has gone through a nominating process of its own.

JUSTICE SOUTER: But may not claim that on the ballot itself?

MR. McKENNA: Correct, Justice Souter.

CHIEF JUSTICE ROBERTS: They're not allowed to split the ballot in their preference, are they, say I prefer one party on domestic issues, I prefer the other party's position on foreign affairs?

MR. McKENNA: No, Mr. Chief Justice, they are not.

JUSTICE SCALIA: One of the briefs says that the Republicans -- I think the Republicans or the Democrats checked with the, with the State election officials who said that there's no provision for convention, for nomination by convention.

MR. McKENNA: Justice Scalia, they did not check with the State officials. They cite in the record letters from a couple of county auditors. But the county auditors have no independent authority. They operate under the secretary of state's rules.

JUSTICE SCALIA: So they can-- they can conduct conventions if they wish?

MR. McKENNA: Yes, sir, Justice Scalia, they

may.

I would just like to close this part of my argument, if I may, by pointing out that in our view the voters have adopted a top-two election system which vindicates both the rights of the parties and the people. The parties can select their standardbearers without any State interference, adopting their own nomination process.

And the people are not limited to candidates selected by the parties. They have more choice, which is a value that was validated in the Jones decision, albeit holding that you can't do that with nonmembers selecting the party's nominees.

The parties, though, argue that no candidate can even state an expression of party preference, cannot make an expression of party preference on the ballot without the party's consent. Taken to its logical conclusion, the parties are really claiming they have a First Amendment right to require the State to place a single candidate of their choosing on the ballot.

If you look at the joint appendix, page 13 --

CHIEF JUSTICE ROBERTS: But clearly, it's just like a trademark case. I mean, they're claiming their people are going to be confused. They are going

to think this person is affiliated with the Democratic or Republican Party when they may, in fact, not be at all.

MR. McKENNA: Mr. Chief Justice, they make that claim without the benefit of any evidence. The Ninth Circuit and the district court and the parties simply assume this will happen, and they assume, for example, that ballot looks just like the old nominating primary ballot, when, in fact, as we've shown, it clearly will not. And, of course, we don't believe trademark law applies here in this case, although I can address that if you wish.

CHIEF JUSTICE ROBERTS: I didn't suggest it would be a trademark violation. I think I said it was just like the same analysis. And I don't know why you would give greater protection to the makers of products than you give to people in the political process.

MR. McKENNA: They deserve protection, of course, Mr. Chief Justice. The question is whether or not merely allowing someone to express their party preference somehow will mislead the voters. This Court has shown more faith in the voters than that.

I'll reserve the balance of my time. Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Thank you, General.

Mr. White.

ORAL ARGUMENT OF JOHN J. WHITE, JR.

ON BEHALF OF RESPONDENTS

MR. WHITE: Mr. Chief Justice and may it please the Court:

Candidates are the party's messengers to win over the public on the important issues of the day. Initiative 872 converts the established right of political parties to select their messengers into a mere right to endorse.

JUSTICE SOUTER: What do you -- what do you say about the fact that you have a right to select and designate an official candidate and it's independent of this ballot procedures?

MR. WHITE: As the secretary of state pointed out -- and this is at JA-363 -- the secretary of state indicated the State would pay no attention to the party's nominating conventions and instead would continue to allow candidates to use party labels just as they had in the primary before.

JUSTICE SOUTER: Okay. If the rationale in Jones was that the defect was that the association, political association, was being adulterated by the method of, of the use of ballots, to select what was an official nominee, that problem does not exist here.

MR. WHITE: It does, it does, Your Honor. And it does in the manner that this -- the candidates who were selected at the Initiative 872, the modified blanket primary, are going to be carrying the party's standard in the general election.

JUSTICE SOUTER: You're saying in practical terms, this is a nomination, even though there may be a separate official nomination that nobody pays attention to?

MR. WHITE: Absolutely, Your Honor.

JUSTICE SOUTER: Then why is one party going to the trouble of establishing a convention system to make nominations?

MR. WHITE: We adopted -- the Republican Party, the Democratic Party and the Libertarian Party all adopted rules governing nomination of our candidates by convention. We corresponded with all of the county auditors who would be conducting partisan elections in 2005, and we received identical letters from all four of them indicating that they had consulted with the Secretary of State and that the initiative contemplated no partisan nomination process separate and apart from the primary. The Secretary of State received copies of those letters; the Secretary of State's public statements with respect to those letters was that they

would pay no attention to the nominating process.

JUSTICE SOUTER: Well, they will pay no attention, I take it, in the sense that there will be nothing indicating an official nomination on the ballot itself. But as I -- I am also assuming that the parties through a convention, or whatever other scheme they can come up with, can -- can designate an official nominee quite independently of this ballot. And if they do so designate, they can campaign on that person's behalf. The person in campaigning can say, I am the official nominee of the X party. And those facts are true, aren't they?

MR. WHITE: They are, Your Honor, but that converts the right to nominate to a mere right to endorse, and this Court has recognized that the ability to endorse a candidate is no substitute --

JUSTICE SOUTER: You're saying that a right to nominate has to be a right to exclude everyone from the ballot except the nominee -- everyone from the ballot under that banner, from the nominee.

MR. WHITE: To be -- to be a meaningful right to nominate, yes, Your Honor. It --

JUSTICE GINSBURG: Where does that right come from? I thought in Jones, the Court had said if you had just a blanket primary, with no indication of

party affiliation, that that would be constitutional. And if that's so, then parties don't have any right to have a candidate.

MR. WHITE: I'm not suggesting that the parties have a constitutional right to place their party name on a truly nonpartisan ballot, and I think what the Jones Court was hypothesizing was the true nonpartisan primary where there are no party identifications. Our objection is not to a -- necessarily to a nonpartisan ballot. It's to a partisan ballot where the State is going to put someone else on that ballot using our party's name and competing against our nominee under --

JUSTICE GINSBURG: So you would have no objection if this - everything was the same, except no party affiliation were shown.

MR. WHITE: That --

JUSTICE GINSBURG: That would be constitutional?

MR. WHITE: That would not violate our First Amendment rights, Your Honor. Washington --

JUSTICE STEVENS: May I ask this question? It's hypothetical, I suppose, but supposing the statute further provided that a candidate may not designate a preference unless he has been a registered member of that party for at least a year, and otherwise the

statute is exactly how it is now. Would that be constitutional?

MR. WHITE: No, Your Honor, because the State is still then resolving what is an internal factional fight between real Republicans using a blanket ballot where voters from rival parties are able to determine --

JUSTICE STEVENS: In my hypothesis the person is a real Republican. He is just not the one selected as the candidate.

MR. WHITE: That's correct, Your Honor, but then the blanket is still selecting which Republican advances to the general election.

JUSTICE KENNEDY: Well then, it's not just a rhetorical flourish. It's true; when the State says that you take the position that you are entitled to say on the ballot who your nominee is, that has to be a correct statement of your position given this statute and given the issues presented to us here.

MR. WHITE: I'm -- I'm not --

JUSTICE KENNEDY: Or is that just somewhat hyperbolic? It seems to me he is right based on your -- on the position you're now stating.

MR. WHITE: The political parties have the right to nominate their candidate and restrict the use

of the party name to candidates who have been authorized to use that.

JUSTICE SCALIA: I didn't understand you to say that you have a right to a partisan process in which your -- only your nominee is shown. I thought you're saying that if it is a process in which party affiliation is shown, then your endorsed candidate should be set aside somehow.

MR. WHITE: That, that -- that is our -- is our position, Justice Scalia. We are not suggesting we have a right to a partisan process. Washington's constitution makes its legislative elections a partisan process, but once the State has decided to use partisan identification as the sole information that's presented on the ballot, it is telling the voters that this is the most important thing for you to be considering when you --

JUSTICE STEVENS: Even if the information is by statute true, in my hypothetical he must be a member, but still you make the same objections.

MR. WHITE: Yes, Your Honor. As this Court pointed out in Jones with the comparison of the Mario Cuomo/Edward Koch race, it is for the political parties to be able to resolve that internal party competition. Initiative 872 still uses blank --

JUSTICE STEVENS: You're stating to suppress information. So the plaintiff says there is nothing to prevent the nominee or the convention from publicizing widely the fact that the convention picked me as their standard bearer. The fact that some other member of the party gets his name on the ballot doesn't prevent the public from being informed about the truth, does it?

MR. WHITE: Perhaps I misunderstood your question, Justice Stevens. The Republican Party would not prevent the unsuccessful candidate from running in the election. He could run --

JUSTICE STEVENS: It would prevent him from running and saying he is a Republican.

MR. WHITE: On -- having him listed on the ballot where the State is indicating that that is the most important information to consider, the partisan affiliation, and the State has hypothesized through the Grange reply brief that there are all these other possible formulations to ballot. However, before the Ninth Circuit, in the State's petition appendix at page 24a, the Ninth Circuit squarely put to the State's attorney the question: How would candidates be designated on the ballot where you had two Republicans who had competed against each other in the party's nominating process, and one had been selected; and a

third candidate who had absolutely no affiliation with the party also entered the race. And the State told the Ninth Circuit yes, they would be identified identically on the ballot.

JUSTICE KENNEDY: Suppose there were an empirical study that Washington voters know about this system, and that 80 percent of the Washington voters know that the party has not endorsed any one of these -- all of these candidates. That it's just say a statement of preference, that that's all it means; the voters know this. Is your position the same?

MR. WHITE: Yes, Your Honor. The notion that disclaimers are necessary, and the State indicates that they will spend a million dollars to try to clear this up, is evidence of the confusion that's likely to occur. But even if the State does come forward and put all these disclaimers and preferences on, what the State is essentially doing on the ballot is masking who the Republican Party's nominee is by the presence of other candidates --

JUSTICE KENNEDY: But -- but my submission, or my hypothetical and it's just a hypothetical, is that no one is misled by this.

MR. WHITE: Do we know --

JUSTICE KENNEDY: Accept the hypothetical as

true. Then what's the injury?

MR. WHITE: The interest then is that you still have two Republican-identified candidates who are purporting to carry the party's message to the voters, and the voters are resolving that intra-party competition.

CHIEF JUSTICE ROBERTS: If you have, for example, a disclaimer, it seems to me that undermines your argument that they are successfully, anyway, purporting to carry the party's message.

MR. WHITE: Well, if you have the disclaimer, Your Honor, and the statements that this doesn't really mean anything, then you would come to the question of what legitimate State interest is being advanced by having someone put Republican on the ballot as their party preference, when it in fact means nothing; it does not mean they are associated with the party. It does not mean --

JUSTICE GINSBURG: How does one associate -- this one -- I think General McKenna told us that in the State of Washington people do not register membership in one party or the other, so how does the Republican Party determine who is a Republican?

MR. WHITE: At -- do you mean a legitimate Republican candidate? Or --

JUSTICE GINSBURG: No, who do you consider a member of the party? If you say I am a Republican in the State of Washington, what does that mean? It doesn't mean I registered Republican because Washington doesn't register people by party.

MR. WHITE: The three political parties each have different definitions and ways to become -- ways to become affiliated with the party. Under the Republican Party rules if you identify yourself to the Republican Party that yes, I am a Republican, you attend our caucus and convention system, you contribute funds to the party, you can be a member of the Republican Party. The Libertarians --

JUSTICE GINSBURG: Any one of those, contributing funds is enough? You don't have to go to the convention if you are --

MR. WHITE: You don't have to go to the convention, but there is also a difference there between being a rank-and-file member and being a spokesman of the party. I'd like to turn to the Libertarians, though, for instance. The Libertarians require you to sign a membership application and all members of the Libertarian Party in Washington must sign a pledge that they oppose the use of force in the resolution of political disputes.

CHIEF JUSTICE ROBERTS: Libertarians have a lot more rules than the other parties.

(Laughter.)

JUSTICE SOUTER: You -- you have identified -- in the course of your argument, you've identified two separate problems with the -- with the scheme as you see it. One is, as you put it, that it masks the identity of an official nominee, and the other is that it in effect allows competition on the ballot by a person under the same party banner with the official nominee.

MR. WHITE: Yes. After the party has already resolved its internal disputes and determined who its spokesman will be, the State allows --

JUSTICE SOUTER: Right.

MR. WHITE: -- any candidate to appropriate the name and compete against our nominee.

JUSTICE SOUTER: I -- I -- no, I understand that to be your position, but my question is, and I realize there is a certain awkwardness to this, but we -- we've got to face it: If the masking of the identity of the candidate is the real flaw, then the -- the hypothetical that was included in the -- in Jones, in the dictum, of the -- of the party that -- of the ballot that has no party identification whatsoever, that would equally be bad, wouldn't it?

MR. WHITE: No, Your Honor, because what it is, in this instance, Initiative 872 is a partisan primary that would mask the identity of the party nominee.

JUSTICE SOUTER: But if it's the masking that's the problem, the -- the nominee is going to be just as well masked on the ballot or better masked on the ballot that allows no statement of preference at all.

MR. WHITE: No, Justice --

JUSTICE SOUTER: And -- and I'm not saying that that's fatally your case, but I mean it's -- it's something we need to be careful about when we're doing our thinking, and that's why I'm pressing you on it.

MR. WHITE: Well -- and I think it's -- it's the masking in the context of a partisan system. The State may elect to have nonpartisan offices, and many local offices throughout the West are nonpartisan.

JUSTICE SOUTER: But if -- but if it's just masking in a partisan system, then it seems to me you're making the same argument that you make when you say, by allowing statements of preference, we obscure the character of the official nominee and in effect allow somebody to have a -- a second shot at -- at getting Republican support as a Republican.

It seems to me that if it's masking in a partisan ballot that's the real problem, there's only one objection and the objection is not so much the masking as it is the submergence of the official nomination by allowing competition under the party's name by another candidate. Isn't that fair to say?

MR. WHITE: I -- I think, Justice Souter, that it -- that it is two separate inquiries. First you have the difficulty that as a practical matter these candidates will be identified as Republican nominees or Republican candidates, but even if the State were able to posit sufficient disclaimers and caveats, that the State has shown no valid interest in allowing a candidate to use the name --

JUSTICE STEVENS: Well, but don't you think it's relevant information? Wouldn't a voter like to know whether a person preferred the Democrats or the Republicans?

MR. WHITE: Well, it's -- it's relevant information, Justice Stevens, only to the extent that it connects the candidate.

JUSTICE STEVENS: Only if true.

MR. WHITE: To -- to the extent it connects the candidate to the political party and its positions on the issues. And as the State points out in its reply

brief --

JUSTICE STEVENS: Let me ask this question: This is a facial challenge, is it not?

MR. WHITE: Yes, it is, Your Honor.

JUSTICE STEVENS: And what exactly -- what relief did the district court grant? Did he enjoin the entire blanket primary or just the designation of parties?

MR. WHITE: The district court enjoined the entirety of Initiative 872 because it determined that the party preference provisions of Initiative 872 were not severable under Washington State's test for severability.

JUSTICE STEVENS: Do you think that was the narrowest relief he could have granted to avoid the constitutional difficulty that you see?

MR. WHITE: I -- I think that was the -- I think that was the appropriate, and it is a narrow relief. The court looked at the structure of the initiative, the connection of the party preference, and the party preference provisions permeate Initiative 872, and determined that severability was not appropriate. Yes, I do, Your Honor.

JUSTICE STEVENS: Do you think it would be administerable if it was severed, if the preference

provision was just deleted?

MR. WHITE: I'm not -- I'm not sure that it would, Your Honor. I'm not sure that it would because -- and what the State and the Grange argued below is that -- they actually argued for severance because that would then convert Initiative 872 into a truly nonpartisan primary, but that's not what was on the ballot. If you take a look at -- it's JA 400.

JUSTICE STEVENS: I'm confused about the difference between a facial challenge and an as-applied challenge. On the one hand, it's very helpful to you. There's no evidence out there that this has ever -- this has ever been a problem, so you've got to attack it right away, but then you have this relief that basically enjoins the whole -- whole procedure.

MR. WHITE: Well, the Court asked General McKenna a question during his argument about whether the problem had ever occurred with a false-flag candidate capturing a party's name on the ballot. It has not under Initiative 872 because it was enjoined before being effective. But at page JA 239 there's testimony that --

JUSTICE STEVENS: Yes, but it also seems highly improbable if you have a nominee as a result of a convention, everybody reads the newspapers, they know

who the Republican nominee is, that there's going to be such confusion that everybody thinks it's one or two of the other people who also put an R after their name. The likelihood of massive confusion seems highly improbable to me. I mean you -- you have your own convention where you nominate the Republican nominee, your preferred candidate, and that's publicized generally throughout the State, and you're concerned that somebody going into the ballot box won't -- won't understand what's been going on.

MR. WHITE: Your Honor, it's -- the State has indicated that our nominee, the unsuccessful nominee and the false-flag candidate would all be listed on the ballot identically. The --

JUSTICE STEVENS: But, again, the ballot's not the only information available to voters when they go into the polls.

MR. WHITE: No, but it's the only information presented to the -- the voters at the critical moment when they're casting their ballot, and as this Court has noted in -- with respect to term limits or provision of truthful information regarding race on a ballot, a State cannot put its thumbs on the electoral scales by favoring one group of candidates over another.

JUSTICE SCALIA: I suppose you could say the same thing about the candidates' party preferences. They can make that known to the voters in the newspapers when they run.

MR. WHITE: That's -- that's exactly the case, Justice --

JUSTICE SCALIA: I don't have the Republican Party endorsement, but I prefer the Republican Party.

MR. WHITE: And with respect to the importance of party designations and party information on the ballot, last term the Chief Justice, in Wisconsin Right to Life, ordered a study that showed that 85 percent of voters couldn't name a single candidate for the United States House of Representatives in their own district, but the -- the voters know the political parties. The political parties spent, in our case, a century and a half and, in the Democratic Party's case, 200 years developing a message and developing a set of principles with which the parties are associated, and --

JUSTICE KENNEDY: What would be the validity or the invalidity, in your view, of a scheme which said that the ballot has one candidate who says, Smith, Republican nominee, and the other candidates -- other candidates say, Republican preference?

MR. WHITE: I think the question there, Your

Honor, is what is the legitimate interest of the State in putting that information on the ballot? At -- their reply brief at page 6, the State says an independent who does share the views of either the Republican or Democratic Party may prefer the Republican Party. That preference may be because that independent is running in a district that's 70 percent Republican. And the question is, what is the legitimate interest of the State in providing that information that says, I prefer the Republican Party, where it connotes no connotation, no --

JUSTICE KENNEDY: You -- you can't answer my question? You can't hypothesize any legitimate State interest for doing that?

MR. WHITE: I -- I cannot, Your Honor, because either -- if there is legitimate State interest, the interest is in providing information about that candidate's positions and linkages to the Republican Party by saying, my preference is Republican because I believe what the Republicans are, whether that candidate is David Duke, in the Republican case, or in the case of the Democrats, a Lyndon LaRouche candidate.

JUSTICE KENNEDY: Well, when the Court writes this opinion, what's the fairest statement of the State's interest in this requirement? What do you think

is the fairest statement of the State's interest?

MR. WHITE: I think the fairest -- the fairest statement of the State interest would be that the State has no interest in creating the impression of false associations or allowing opportunistic candidates to appropriate the political party --

JUSTICE KENNEDY: You think there's no legitimate interest? It's -- it's an unfair question, I suppose.

JUSTICE SCALIA: I thought you said the State's interest was to -- to do what we disapproved in Jones without seeming to do what we disapproved in Jones.

MR. WHITE: That -- that would be an acceptable phrasing of the State's interest as well, Justice Scalia.

(Laughter.)

JUSTICE KENNEDY: Well, I'm going to ask the State the same question.

MR. WHITE: If there are no further questions, Initiative 872 is unconstitutional and the judgment of the lower court should be affirmed.

CHIEF JUSTICE ROBERTS: Thank you, Mr. White.

General McKenna, you have 4 minutes

relating.

REBUTTAL ARGUMENT OF ROBERT McKENNA

ON BEHALF OF THE PETITIONERS.

MR. McKENNA: Thank you, Mr. Chief Justice.

First of all, Justice Kennedy, the State's interest is what we have said it is all along. It is to convey some information on the ballot in the same way that the party label does. I have noticed that the political parties have never objected to having their nominees listed on the ballot as -- you know, as such.

In this case it's an expression of party preference, to be sure, and nothing more than that; and there is useful information which is conveyed. We are not required to allow it, but the voters have chosen to allow it.

JUSTICE ALITO: Can I ask you to clarify something you said during your initial argument? I understood you to say that the sample ballot on page 1 of the Grange reply would be unconstitutional.

MR. McKENNA: No, Your Honor. I did not say that it would be unconstitutional. I said that that would be a different argument. It might be a more difficult argument. The Ninth Circuit assumed that that is what the ballot would look like, even though there was not basis for the Ninth Circuit reaching that

conclusion.

CHIEF JUSTICE ROBERTS: Maybe I'm wrong. I thought you did say it would be unconstitutional.

JUSTICE SCALIA: I did, too.

CHIEF JUSTICE ROBERTS: And could you --

JUSTICE SCALIA: You should have said that.

CHIEF JUSTICE ROBERTS: I mean how would you defend that? I mean --

MR. McKENNA: Well, I would defend it, Your Honor, by saying that this is a facial challenge. Let's apply it. And if there is evidence --

CHIEF JUSTICE ROBERTS: Well, we are assuming it is applied in the way that is shown on the Grange reply brief at page 1. If it were applied in that way, would that be unconstitutional? It just says R or D.

MR. McKENNA: It would -- it could be unconstitutional, Mr. Chief Justice, if there were evidence that the voters were misled or confused.

Mr. Chief Justice, this is an excellent opportunity to point out that the letter after the name, whether it's the letter as on page one of the Grange ballot or an expression of party preference on pages two and three, is not the only information on the ballot.

As we've shown in the samples, there will be

lots of other information on the ballot which clearly distinguishes the expression of party preference.

JUSTICE STEVENS: Isn't it also true that, by hypothesis, there will be other candidates beside the one R and the one D? If there aren't at least two R's and two D's, there is no problem.

MR. McKENNA: In the scenario or the ballot on page 1, Justice Stevens, I believe that what would happen is the Secretary of State would still provide the additional language. If that additional language is not provided, if it were just that bare ballot with no explanatory language, then, yes, it would be much harder to defend as being constitutional. But that, in fact, is not the way it's going to work.

JUSTICE STEVENS: But my point is there could never be a ballot just like this, what your opponents are talking about, because there are always going to be at least two or three R's and two or three D's. And the sample shows there is only one, which must then be the party chosen -- I mean the nominee chosen at the convention.

MR. McKENNA: But the key here, Your Honor, is that even under the ballot on page one, what is not happening under top- two is that the nominee of the party is not being selected. That's not happening any

more. And in Jones the Court said that the top-two is the same in all characteristics save one, which is the result of the nominee not being selected.

And that is exactly what is happening under top-two: The nominee is not being selected; and, as applied, we are going to be providing lots of other information on the ballot to make it very clear what the expression "party preference" means.

JUSTICE KENNEDY: Does the State have a legitimate interest in weakening the influence of political parties?

MR. McKENNA: No, Your Honor, it does not.

JUSTICE KENNEDY: If we found that that was the necessary effect of this ballot measure, then would it be invalid?

MR. McKENNA: I think Your Honor you would have to find there is a severe burden on the parties and subject the provision to party presence to strict scrutiny. It would be receiver -- Your Honor.

CHIEF JUSTICE ROBERTS: If the state has no legitimate interest it's going to fail any level of scrutiny.

MR. McKENNA: It has legitimate interest indicating something about party on the ballot. This, the same legitimate interest that occurs in a nominating

primary where the, where the party, where all the candidates who have filed under that office are going to miss the party in terms of conveying our -- on the question of receiveribility I think Washington law applies here the McGowan three-part test which is paralleled under Federal severability and booker simply states that an act or statute is not unconstitutional no its entirety unless it's believed the voters would not have passed one without the other or unless the validation party to accomplish the legislative purposes clearly understands in this case the main purpose was to preserve choice. It was called the People's Choice Initiative. Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Thank you, general. The case is submitted.

(Wherupon, at 10:53 a.m. the case in the above-entitled matter was submitted.)

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